General Practice, Solo & Small Firm Division
AMERICAN BAR ASSOCIATION

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Law Trends & News

Practice Area Newsletter

Defending Liberty
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WINTER 2010
Vol. 6, No. 2

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Chair's Note

Dear Division Member:

Below is the second issue of *Law Trends* for the 2009–10 bar year. As always, the editors believe this is a very exciting issue, and I am very happy to present it to you. As with prior issues, this enewsletter includes articles, checklists, and other valuable practice information and practical tips, from our substantive practice and other areas in the General Practice, Solo & Small Firm Division. This issue continues to include articles dealing with practice management and issues affecting each solo and small firm attorney in these troubled times. It presents several articles dealing with managing your time in the practice of law.

In this issue, the editors have continued to present articles that are of interest to lawyers with solo and small-firm lifestyles who are managing their practices. We are very pleased to present this information in *Law Trends*, and we will be publishing articles quarterly. The articles give many tips and other ideas on how to manage your practice, get new clients, and budget your time.

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

There are many Division members integrally involved in putting this enewsletter together. Their hard work and dedication are certainly present. I thank them for producing this issue for the Division.

I hope each of you enjoys this issue of *Law Trends*. The publication will continue quarterly, and we hope you continue to find it a source of valuable information. If you are interested in either writing an article or participating in the production of the newsletter, please contact Jim Schwartz at attyjls@aol.com. I thank him for his work and dedication.

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Best regards,
James M. Durant, III
Chair, General Practice, Solo & Small Firm Division

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Featured Author

Cynthia Thomas is a founding member of the Seattle firm Real Property Law Group, PLLC. Cindy is a member of the American College of Real Estate Lawyers and limits her practice to complex commercial real estate transactions, financing, and leasing. Cindy can be reached at cthomas@rp-lawgroup.com or 206-625-1717.

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REAL ESTATE

Practice Pointers in Commercial Real Estate Leasing: Drafting the Assignment, Sublease, or Consent

By Cynthia Thomas

Assignments and sublettings have critical differences in the triumvirate relationship between landlord, tenant and transferee in a commercial real estate lease. In an assignment, the assignee steps into direct contractual privity with the landlord. Either the landlord or the assignee can then sue the other directly to enforce the requirements of the lease. Meanwhile, the tenant in the assignment technically remains liable under its contract with the landlord, unless the landlord and tenant agree otherwise. Note that there is a risk that a modification of the lease made by landlord and assignee may have the unintended effect of releasing the assigning tenant from liability under the lease. By contrast, in a subletting the landlord and subtenant do not enter into contractual privity; rather, a second contract—the sublease—arises. The landlord's lease with the tenant becomes in effect the "master lease," and the

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subtenant is apportioned certain of these rights under the sublease. If the master lease terminates, the sublease terminates as well. It follows from this relationship that the subtenant cannot legally obtain via the sublease any greater rights to the space than the tenant has under its lease with the landlord. More important, in a sublease the only relationship the subtenant has is with the prime tenant (in their own landlord–tenant relationship), and the only relationship the landlord has is with the prime tenant. Thus, absent special contractual agreements, the landlord has to look to the tenant (not the subtenant) if the subtenant is creating problems, and the subtenant must look to the tenant (and not the landlord) if the landlord is creating problems.

Assuming the parties have decided whether an assignment or a sublet suits their needs, the lawyer's task is then to draft the appropriate documents. Below are some points to consider in that process:

Drafting the Assignment

The tenant or assignor usually drafts the assignment. Landlord's counsel should resist drafting the assignment, as neither the tenant nor the assignee is his client. The assignment typically includes: (a) basic representations and warranties by the tenant; and (b) an allocation of responsibility for lease obligations between tenant and assignee. Landlord should draft the landlord's consent to the assignment.

The assignee should request that the tenant provide certain representations and warranties in the assignment (ideally, the assignee would like similar representations and warranties from the landlord, but a landlord is likely to resist such a request). Specifically, the assignee wants tenant's assurances that tenant has provided the assignee with a true, correct and complete copy of the lease, that the lease is in full force and effect, and that the lease has not been modified, supplemented, or amended except as expressly set forth in the assignment. The assignee wants tenant to warrant that neither tenant nor landlord is in default under the lease and that tenant has no knowledge of any fact or condition which, with notice or lapse of time or both, would constitute such a default. The assignee also wants tenant to warrant that it has not assigned, transferred, or delegated any of its rights or duties under the lease.

Both the tenant and assignee want the assignment to allocate responsibility between the parties. The assignee does not want to take responsibility for preassignment costs, such as an underpayment of common area maintenance (CAM) expenses by tenant. The tenant wants to ensure that the assignee is

responsible for all postassignment costs. Both parties are likely to require an indemnification provision in the assignment that protects them from liability for the other party's negligence or willful misconduct.

The assignment should exclude any provisions in the lease that are solely for the benefit of the tenant. For example, options to extend the lease term, rights of first refusal, and purchase options are often exclusively for the benefit of the tenant and nontransferable and/or the tenant does not wish to transfer them.

Unless the assignment is a permitted transfer that does not require landlord's consent, the assignment must either include a landlord's consent clause or be contingent upon execution of a separate landlord's consent agreement.

Drafting the Consent to Assignment

If the lease requires the landlord's consent, the assignment should be contingent on obtaining such consent on terms acceptable to the tenant and assignee. Sometimes the consent is included in the form of the assignment but generally landlords will require a separate form to address the issues of concern to them and it should be signed by the landlord, tenant, and assignee. For example, the landlord wants language in the consent specifically stating that landlord's consent to the assignment does not release tenant from liability under the lease, does not waive its right to consent to future transfers, makes both tenant and assignee primarily liable on the lease to landlord, covers any approval of changes to use, signage, etc. The assignee will want the consent to include an estoppel from the landlord (the copy of the lease is complete, there are no other agreements, landlord is not aware of any defaults, etc.). The tenant may also want the consent to provide that the landlord will look first to the assignee in the case of a default, which, of course, the landlord will not want to agree to do. Consider also issues relating to percentage rent. If the lease contains options, the landlord may want to include a statement in the consent that exercise of the options does not constitute a "modification" of the lease and the assignor tenant remains bound during the option term(s). Landlords should review the entire lease in connection with the drafting of the consent, looking for particular provisions that were drafted specifically in light of the original tenant (extra parking stalls, no after-hours HVAC charges because this tenant rarely worked after hours, etc.).

Drafting the Sublease

The tenant or sublandlord usually drafts the sublease using one of three approaches. The simplest approach is for the sublandlord to incorporate the lease in its entirety. This approach, while quick and efficient, is problematic in that it fails to allocate the rights and obligations of the landlord, sublandlord, and subtenant and is likely to incorporate terms into the sublandlord–subtenant relationship that do not belong there (such as the limitation of landlord's liability to its equity interest in the building/project) and is a particularly poor fit where the sublease is just of a portion of the premises covered by the lease. A second approach is for the sublandlord to create a new sublease that restates all of the applicable terms in the lease and provides new terms. This approach is also problematic in that it is highly inefficient, encourages renegotiation of lease provisions, and increases the risk that a provision in the sublease will contradict the lease. The third and best approach is an approach that incorporates applicable lease provisions, excludes inapplicable lease provisions, and provides new terms that clarify the relationship between the parties, thereby balancing efficiency with efficacy. The following describes some of the new terms commonly provided in sublease agreements.

Sublandlord Representations and Warranties

The subtenant generally requires that the sublandlord provide certain representations and warranties in the sublease. Some of these representations and warranties are comparable to those required by assignees in an assignment. The subtenant wants sublandlord's assurances that the sublandlord has provided the subtenant with a true, correct, and complete copy of the lease, that the lease is in full force and effect, and that the lease has not been modified, supplemented, or amended except as expressly set forth in the sublease. The subtenant wants the sublandlord to warrant that neither sublandlord nor landlord is in default under the lease and that sublandlord has no knowledge of any fact or condition which, with notice or lapse of time or both, would constitute such a default. The subtenant also wants the sublandlord to warrant that it has not assigned, transferred, or delegated any of its rights or duties under the sublease. In addition, the subtenant wants the sublandlord to represent and warrant that: (a) sublandlord will not commit or suffer any act or omission that will result in a violation of or a default under the lease; (b) sublandlord will use good faith efforts to cause landlord to perform its obligations under the lease with respect to the premises and to give any required consents under the lease for the benefit of subtenant; (c) sublandlord will deliver to subtenant a copy of any notice received by landlord relating to the premises within a specified period of time; (d) subtenant shall have the right to cure any

default by sublandlord on or before the date sublandlord's applicable cure period expires and sublandlord shall reimburse subtenant for any expenses incurred in curing such default; and (e) sublandlord shall not amend or terminate the lease, or surrender any portion of the premises, without subtenant's prior written consent. The following are some additional details to be addressed:

Sublease Premises

The sublease should specify that portion of the leased premises that sublandlord is subleasing to subtenant.

Sublease Term

The sublease should define the sublease term. The sublease term must be less than the lease term (even if only by one day) to ensure that a court does not reclassify the sublease as an assignment. **Practice Tip**: Subtenants need to think about and plan for this "gap" issue. Generally the subtenant wants the flexibility to stay in the space under a direct lease with the landlord following the end of the sublease term and they won't want to move out for one day and move back. There are various ways to work around this but one option is to include a benign holdover provision in the sublease.

Rent and Other Expenses

The sublease should establish the amount of rent and other expenses owed by subtenant under the sublease.

Provision of Services

The sublease should list those services being provided to subtenant and establish whether those services shall be provided by landlord or sublandlord. **Practice Tip**: If services might be provided by landlord such as after-hours HVAC, the sublease needs to address how the corresponding additional charges will be handled such as after-hours HVAC and what rights subtenant has to arrange those services directly with landlord (since tenant will owe the charges under the lease).

Condition of Premises

Similar to a lease, the sublease should describe the sublease premises condition and any applicable improvements or allowances to be made by sublandlord. Be sure to consider and address what the required surrender condition is.

Insurance, Waiver of Subrogation

The sublease should require subtenant and sublandlord to maintain insurance during the sublease term that complies with the lease and requirements of the parties to the sublease. Additionally, both sublandlord and subtenant should require a waiver of subrogation; ideally, the waiver of subrogation would include landlord as well.

Notice

The sublease should list the addresses to which rent and any notices can be sent.

The sublease should not only add new provisions, but should exclude those provisions in the lease that do not apply to the sublease. Common examples include provisions establishing rent, the lease term, brokerage fees, and any tenant improvement allowance. The subtenant should also request the exclusion of any lease provision that limits landlord's liability to landlord's interest in the building or project area. The sublandlord has no interest in the building or project area and would have no liability under such a provision.

Drafting the Consent to Sublease

Unless the sublease is a permitted transfer that does not require landlord's consent, the sublease must either include a landlord's consent clause or incorporate a separate landlord's consent agreement. Landlord will want to draft its own consent and subtenant will have concerns to be addressed there too. Below is a discussion of some of the issues encountered in the consent on behalf of landlord and subtenants, consider also the impact a sublease could have on percentage rent.

Waiver of Subrogation/Claims

Landlord will want subtenant to waive subrogation claims and subtenant will want the same from landlord.

Indemnification

Landlord will want indemnification from the tenant comparable to that given by tenant to landlord under the lease. Generally, landlord will not agree to grant the same indemnification to the subtenant which was granted to tenant (if any) in the lease.

Estoppel

Subtenant will want an estoppel with respect to covering the usual topics mentioned under Sublandlord representations and warranties above. Landlord may or may not be willing to provide this, and if they do, it will generally be just to landlord's knowledge.

Attornment

Landlord will want subtenant to agree that if the lease terminates due to default, landlord has the option to require subtenant to in effect allow landlord to preserve the sublease and step into the shoes of the sublandlord on the sublease.

Subsequent Transfers

Landlord will want the consent to make clear that landlord retains the right to approve any future assignments of sublease as well as any subsequent subletting by the subtenant and any assignment of the sublease.

Subtenant (and Tenant) Specifics Signage, Use, Approval of Planned TIs

Often the sublease transaction involve a change in signage, new TIs, etc., which require landlord's consent and this consent document is the logical place to include the details of those approvals. Similarly, the lease sometimes includes provisions tailored to the specifics of the tenant that should be modified with respect to the rights of the subtenant.

Notice and Opportunity to Cure

Often subtenants will want landlord to agree to copy them on default notices and allow them to cure the default. See also the discussion above regarding obtaining a new lease.

Nondisturbance

Subtenants want landlord to be obligated to recognize their sublease as a direct lease if the lease is terminated due to default by tenant. Needless to say, landlords are generally not too excited about granting such rights, particularly in cases where the sublease rent is less than the rent under the lease and/or the premises is less than all the space covered by the lease. However, in this economic environment, we may be seeing this much more often than in the past.

Approval of Sublease Document

Landlord will want to tie its consent to the actual sublease document, not to the LOI. This is important because as discussed above, the sublease will cover any number of issues which are specific to the sublease itself, including operational

issues important to landlord.

Direct Payment of Rent

Landlord will want the right to collect rent directly from subtenant, and subtenant may correspondingly want the right to pay the rent directly to insure that it is applied to the rent due on the lease.

Cynthia Thomas is a founding member of the Seattle firm Real Property Law Group, PLLC. Cindy is a member of the American College of Real Estate Lawyers and limits her practice to complex commercial real estate transactions, financing, and leasing. Cindy can be reached at cthomas@rp-lawgroup.com or 206-625-1717.

Note

Please note that all real estate transactions are fact specific, and this article is not intended as legal advice. In addition, the reader should note that this article was written from the perspective of a Washington state real estate attorney. Since real property is one of the most state-specific practices areas, the reader is urged to consult the statutory and common law in her own jurisdiction, in addition to considering the points raised in this article.

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REAL ESTATE

Attempts to Impose Regulation and/or Voluntary Guidelines on Lawyers: An Update on the FATF Guidance for Legal Professionals

By Kathleen J. Hopkins

Lawyers involved in any of the following activities may soon be subject to state and/or federal regulation and/or adopting voluntary good practice guidelines as part of an international effort to combat money laundering and terrorism financing. The international community has cast its net quite broadly to include lawyers who are engaged in:

- buying and selling of real estate,
- managing client money, securities, or other assets,
- management of bank, savings, or securities accounts,
- organization of contributions for the creation, operation, or management of companies, and

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- creation, operation, or management of legal persons or arrangements, and the buying and selling of business entities.

Lawyers in all practice settings, whether engaged in consumer and commercial matters, may be caught in this broad net and could soon be required to conduct enhanced client due diligence, institute internal controls, and be subject to governmental oversight and monitoring.

Background

In 1989 the G-7 ministers issued an economic declaration covering numerous issues concerning international monetary developments. In connection with this declaration, the leaders agreed to the creation of the Financial Action Task Force on Money Laundering (FATF). which was tasked with coordinating efforts to prevent money laundering in both domestic and international arenas. The FATF has 34 members: 32 countries and territories and 2 regional organizations.

FATF Recommendations

In 1990 and 2001, the FATF issued recommendations to provide a set of countermeasures against money laundering and terrorism financing. The recommendations covered a wide range of topics, including an effective criminal justice system, structure for a country's regulation of its financing system, and international cooperation. The recommendations are not a binding international convention, but many countries (including the United States) have committed to implementing them to combat money laundering.

Of particular interest to lawyers are Recommendations 33 and 34, which address the exploitation of "*legal persons*" (i.e., legal entities such as trusts, LLCs, corporations, partnerships and the like) and legal arrangements by money launderers. In addition, legal professionals should be aware of Recommendations 13 through 16, which deal with suspicious transaction reporting (STR) and the no tipping off rule (NTO). The latter set of recommendations is applied to financial institutions and the application of the STR and NTO recommendations to the legal profession is controversial and is subject to continued discussion.

The FATF also issued guidance on the FATF Recommendations, including its recommendation to apply antimoney laundering regulations to nonfinancial businesses and professions, such as lawyers. This included recommendations that certain antimoney laundering measures be extended to lawyers including (1) increased regulation and supervision of the profession, (2) increased due diligence requirements on clients, (3) new internal compliance and record

keeping requirements for lawyers and firms, and (4) new STR requirements mandating that lawyers report to a government enforcement agency or a self regulatory organization information that triggers a "suspicion" of money laundering relating to client activities. It also recommended enforcement through criminal, administrative or other sanctions. The ABA, through its Task Force on Gatekeeper Regulations and the Legal Profession, provided formal comments to this paper, including criticism about the absence of input from the legal profession on the roles and work of the legal profession. In addition, in February 2003 the ABA House of Delegates passed a resolution opposing any mandatory STR obligation that would compromise the confidentiality of client information or adversely affect the attorney-client relationship in the U.S. justice system.

FATF Evaluation of United States

In 2006 the FATF evaluated the United States and found United States noncompliant with Recommendation 33. Its conclusions included: (a) there were no measures in place to ensure adequate, accurate, and timely information on the beneficial ownership and control of legal persons that can be accessed in a timely fashion by competent authorities; (b) there were no measures taken by those jurisdictions that permit the issue of bearer shares to ensure bearer shares are not misused for money laundering; and (c) a general criticism of the United States's lack of available information of private companies registered within its borders.

FATF Guidance for Legal Professionals

Meanwhile, the FATF also finalized recommendations encourage countries to develop a risk-based approach to antimoney laundering and to combating terrorism financing. This approach envisions that limited resources will be employed to address the greatest risks. In 2007 the FATF issued the Financial Institution Guidance and in October, 2008 issued its Guidance for Legal Professionals (the Lawyer Guidance). The can be reviewed in full at www.fatf-gafi.org/dataoecd/5/58/41584211.pdf.

Three U.S. Responses to the FATF Recommendations

1. Proposed Federal Legislation

In 2007 Senators Levin, Coleman, and Obama proposed S. 681 (Stop Tax Haven Abuse Act), which proposed subjecting persons involved in formation of companies to the antimoney laundering requirements of the Bank Secrecy Act (which is similar to the approach adopted and challenged in Canada). The

definition of those covered by the proposed legislation was broad enough to include lawyers and others involved in the process. In response, the ABA and other groups began to work with the U.S. Departments of Justice and Treasury to, hopefully, resolve law enforcement's information-gathering concerns other than through federal legislation. An newer version of the same proposal, S.569, surfaced in 2009 and was last discussed in committee in November 2009, with the ABA, the National Association of Secretaries of State, and the U.S. Treasury Department representatives testifying that it needed to be substantially revised. After the 2007 attempt to federally regulate such lawyer activities, the ABA House of Delegates also passed a resolution that, *inter alia*, urged Congress to refrain from enacting legislation that would regulate lawyers in the formation of business entities and defer to the states as they consider amendments to their various entity formation laws.

2. Uniform State Law for Entity Formation Information

On October 9, 2009 the National Conference of Commissioners on Uniform State Laws finalized the Uniform Law Enforcement Access to Entity Information Act (the Uniform Act). The text and commentary can be found at http://www.law.upenn.edu/bll/archives/ulc/roba/2009final.pdf.

For the most part, the Uniform Act lies dormant in the states, awaiting the resolution of the federal legislative attempts. The Uniform Act would provide a process for law enforcement to gain access to information concerning the natural persons behind legal entities such as corporations, LLCs, partnerships, trusts, and the like. It will impose requirements on such entities to designate a natural person within the jurisdiction who will have to maintain complete and updated records on the legal and beneficial owners of the entities. For lawyers trying to maintain the relative confidentiality of the actual entity owners, it will be important to encourage their jurisdictions to adopt "optional" Section 15 on confidentiality in the Model Act.

3. Voluntary Guidelines Initiative

The ABA's Task Force on Gatekeeper Regulation and the Profession worked with legal professionals within and without the Association and with the U.S. Department of Treasury to develop "Good Practices Guidelines" to respond and preempt federal legislation. The task force finalized the guidelines late 2009. Since then, several ABA Sections, the American College of Real Estate Lawyer, the American College of Mortgage Attorneys, and the American College of Trusts and Estates Lawyers have already approved the Good Practices Guidelines and are undertaking efforts to educate and encourage their members to voluntarily

adopt the guidelines. For reference, the guidelines are posted on the Division's Real Estate Committee's website: http://new.abanet.org/divisions/genpractice/GP315000/Pages/default.aspx.

Please note, however, that the guidelines have *not* been endorsed by the Division, and the posting on the website is for reference only.

The guidance provides a multilevel risk based process for initial client intake and subsequent inquiry regarding source of client funds. Included as an appendix is a sample client intake process that might be implemented where there is only a "standard" level of risk concerning the source of funds.

For risk assessment, the guidelines instruct the lawyer to consider (1) the country/geographic risk, (2) the service risk, and (3) the client risk. The domicile of the client, the location of the transaction and the client's sources of funds are included in these considerations. Under each category there are enumerated questions to be answered so that the lawyer can appropriately determine whether there are high, low, or standard risk that her efforts will be used for money laundering or terrorism financing purposes. The guidelines also instruct the lawyer to conduct her assessment both prior to and during the course of the attorney-client relationship.

Of course, if a lawyer does apply the guidelines and concludes her efforts are likely to be used for money laundering or terrorism financing, then it is recommended that the lawyer reference the applicable Rules of Professional Conduct (RPC 1.16 in the model rules) concerning the attorney's rejection or withdrawal from representation.

What Affected Lawyers Can Do

- Read the guidelines and decide whether and how you might implement them in your practices.
- Monitor the status of the Uniform Act in your jurisdiction and encourage adoption of optional Section 15.
- Monitor federal regulatory efforts, decide whether you could adapt your practice to comply and at what cost, and, perhaps, contacting your representatives to express your concern over such impact.
- Read more about the FATF and the work of the task force in an article by Kevin L. Shepard entitled "Guardians at the Gate: The Gatekeeper Initiative and the Risk Based Approach for Transaction Lawyers," in the *Real Property, Trust & Estate Journal*, Vol. No. 43, Issue No. 3 (Winter 2009); and also in the report accompanying ABA Resolution 300, which the ABA

House of Delegates passed at its August 2008 session.

Kathleen J. Hopkins is a founding member of the Seattle firm Real Property Law Group, PLLC (www.rp-lawgroup.com). She is also chair of the GPSolo Division's Real Estate Committee. She can be reached at khopkins@rp-lawgroup.com or 206-625-0404.

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Business Law

You Say Tomato, I Say Tomahto: Court Holds Illinois Sureties Act Applicable to Guarantors

By Kenneth J. Ashman & Bardia Fard

The distinction between a "surety" and a "guarantor" is one which may be lost upon many practitioners. According to *Black's Law Dictionary*, a "surety" is defined as "[a] person who is primarily liable for the payment of another's debt or the performance of another's obligation." BLACK'S LAW DICTIONARY 1482 (8th ed. 2004) (emphasis added). In contrast, "[w]hile a surety's liability begins with that of the principal, a guarantor's liability does not begin until the principal debtor is in default." Id. at 724. The distinction may be summarized as follows: a surety is primarily liable on the underlying obligation, while a guarantor is secondarily liable.

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In the strictest sense, then, a surety is a wholly different creature than a guarantor—right? Not according to a recent Illinois Appellate Court decision in *JP Morgan Chase Bank, N.A. v. Earth Foods, Inc.*, 386 Ill.App.3d 316, 898 N. E.2d 718 (2nd Dist. 2008), *appeal allowed*, 231 Ill.2d 632 (Ill. Jan. 28, 2009), which held that the term "surety," as used in the Illinois Sureties Act, 745 ILCS 155/1, also encompasses a guarantor. The holding in *Earth Foods* makes available to a guarantor those defenses previously only available to a surety under the Sureties Act, and the decision may have repercussions for similar statutes across the United States.

In *Earth Foods*, the defendant Earth Foods, Inc. (Earth Foods) was the primary debtor on a line of credit issued by JP Morgan Chase Bank, N.A. (JP Morgan), which was personally guaranteed by Earth Foods' three co-owners, which included defendant Leonard S. DeFranco (DeFranco). *Earth Foods*, 898 N.E.2d at 720. Before JP Morgan sent Earth Foods a notice of default, DeFranco sent JP Morgan a letter alerting it that Earth Foods was dissipating its inventory, which served as collateral to the line of credit, and further demanded that JP Morgan institute an action against Earth Foods. *Id*. After Earth Foods' continued failure to make payment on the line of credit, JP Morgan filed suit against Earth Foods and its three co-owners/guarantors, including DeFranco. *Id*.

DeFranco invoked Section 1 of the Sureties Act, arguing that his notification to JP Morgan of Earth Foods' near-insolvency discharged his obligation as a guarantor. *Id*. at 721. Section 1 of the Sureties Act provides as follows:

> When any person is bound, in writing, as surety for another for the payment of money, or the performance of any other contract, apprehends that his principal is likely to become insolvent or to remove himself from the state, without discharging the contract, if a right of action has accrued on the contract, he may, in writing, require the creditor to sue forthwith upon the same; and unless such creditor, within a reasonable time and with due diligence, commences an action thereon, and prosecutes the same to final judgment and proceeds with the enforcement thereof, the surety shall be discharged; but such discharge shall not in any case affect the rights of the creditor against the principal debtor. 740 ILCS 155/1.1 The trial court rejected DeFranco's argument, and entered summary judgment in favor of JP Morgan. *Earth Foods*, 898 N.E.2d at 721.

On appeal, DeFranco argued that the even though the contract identified him as a "guarantor," rather than a "surety," the trial court erred when it rejected the application of the Sureties Act and entered summary judgment in favor of JP

Morgan. *Id*. The crux of DeFranco's argument was that the term "surety" should be construed to include guarantors. *Id*. JP Morgan countered that the plain text of the Sureties Act made clear that its provisions were unavailable to DeFranco, as a guarantor. *Id*.

In holding that guarantors were included in the term "surety," the appellate court undertook an analysis of the "popularly understood" meaning of the terms "suretyship" and "guaranty." *Id*. Relying on Illinois jurisprudence, sister states' jurisprudence, and several secondary sources, including the Restatement (Third) of Suretyship and Guaranty, the court noted that

> the term "surety" has more than one popularly understood meaning: the word is sometimes used to refer to any situation in which a person agrees to be held liable for the debt of another, whether the liability is primary as a surety or secondary as a guaranty, and it is sometimes used to refer strictly to a surety who is primarily liable.

Id. at 723. The court further opined that the terms "guarantor" and "surety" are "unusually intertwined in legal parlance and that the distinctions between them are arcane and often ignored." *Id*. at 724. Given the interchangeable use of the terms, coupled with the remedial purposes behind the Sureties Act—"to compel diligence by a creditor to make certain a surety is protected against loss"—the court held that the statute applied with equal force to guarantors as it did to sureties. *Id*. (citation omitted). Accordingly, the court found that the trial court erred in granting JP Morgan's motion for summary judgment on the basis that DeFranco could not invoke a defense provided by the Sureties Act. *Id*. at 726.

The holding in *Earth Foods* is the first of its kind in Illinois, and it departs dramatically from the strict definitions ascribed to "surety" and "guarantor." Since the appellate court's decision relied in part on interpretations from sister jurisdictions, the decision has potential implications nationally. Because of the importance of the precedent set by *Earth Foods*, on January 28, 2009, the Illinois Supreme Court accepted an appeal by JP Morgan, which is still pending adjudication. Assuming the high court affirms the appellate court's holding, guarantors will have a new defense to creditors' collection efforts, where the strictures of the Sureties Act are met. Stay tuned for updates as the Illinois Supreme Court weighs in with its definitive ruling on the question.

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Note

1. Section 3 of the Sureties Act provides another defense 1 for a surety, stating as follows: Whenever the principal maker of any note, bond, bill or other written instrument dies, if the creditor does not, within 6 months after the entry of the original order directing issuance of letters of office, present the same to the representative or the proper court for allowance, the sureties thereon shall be released from the payment thereof to the extent that the same might have been collected of such estate if presented in proper time; but this Section shall not be construed to prevent the holder of any such instrument from proceeding against the sureties within such 6 months. 740 ILCS 155/3.

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Business Law

Recent Cases and SEC Staff Guidance on Rule 10b5-1 Trading Plans

By David Lamarre

Directors and officers of public companies frequently rely on so-called Rule 10b5-1 trading plans when transacting in their companies' stock. As a safe harbor from insider trading liability under the SEC's Rule 10b-5, Rule 10b5-1 provides that a purchase or sale of securities will not be deemed to be on the basis of material nonpublic information if it is pursuant to a contract, instruction, or plan that

- was entered into before the person became aware of the information;
- specifies the amounts, prices, and dates for transactions under the plan (or

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includes a formula for determining them); and

• does not later allow the person to influence how, when, or whether transactions will occur.

In addition, the plan must be entered into in good faith and not as part of a scheme to evade the insider trading laws.

The SEC's recent insider trading case against the former CEO of Countrywide Financial highlights the agency's continuing concern about abuses of Rule 10b5-1 plans. In addition, the SEC's Division of Corporation Finance recently updated its publicly available interpretations about these plans.

In light of these developments, executives and directors of public companies should pay renewed attention to the timing and substance of their trading plan activities. Particular care should be taken to avoid adopting or amending trading plans when in possession of material nonpublic information. Structured properly, however, Rule 10b5-1 plans remain useful tools to mitigate corporate insiders' litigation risk.

Recent Litigation on 10b5-1 Plans

Alleged abuses of Rule 10b5-1 plans have taken center stage in a number of recent insider trading lawsuits. In one high-profile example, the SEC filed a civil complaint on June 4, 2009, against the former CEO of Countrywide Financial, Angelo Mozilo, and other former Countrywide executives, alleging that they used Rule 10b5-1 plans to trade illegally on inside information (to the tune of nearly $140 million, in Mr. Mozilo's case). Although all of these sales occurred through Rule 10b5-1 plans, the SEC alleges—citing internal correspondence such as an e-mail stating that the company was "flying blind"—that Mr. Mozilo had material nonpublic information about Countrywide's deteriorating mortgage business when he instituted his trading plans. The SEC also took particular note of the fact that he implemented no fewer than four separate plans during a three-month period, and that sales under the plans began soon after their adoption. SEC v. Mozilo, No. 09CV03994 (C.D. Cal. filed June 4, 2009).

The case also highlights the advisability of avoiding amendments to Rule 10b5-1 plans. The SEC's complaint emphasizes that Mr. Mozilo amended one of his plans just two months after adopting it, essentially doubling the number of shares at a time when Countrywide's stock price was at a historic high—but retaining the same time schedule for sales. This amendment also was found

particularly noteworthy by the federal judge in an earlier lawsuit against Mr. Mozilo by private investors. In re Countrywide Financial Corp., 554 F. Supp. 2d 1044 (C.D. Cal. 2008). In refusing to dismiss the case, the judge stated that he "actively amended and modified his 10b5-1 plans . . . Mozilo's actions appear to defeat the very purpose of 10b5-1 plans, which were created to allow corporate insiders to 'passively' sell their stock based on triggers, such as specified dates and prices, without direct involvement."

Other aggrieved investors have seized on perceived abuses of Rule 10b5-1 plans to pursue insider trading claims. For example, in April 2009, a California federal court refused to dismiss a lawsuit against a technology company's officers, based partly on allegations that they amended their 10b5-1 plans to sell more stock before the market learned of a significant business development. This was deemed sufficient to support an inference of scienter, the state of mind required in a private Rule 10b-5 insider trading lawsuit. The judge also commented that the pattern of the executives' sales "does not square with a typical 10b5-1 plan triggering stock sales on certain dates and at certain prices," noting that the executives sold varying amounts of stock just before the adverse development became public, and on varying dates rather than regular dates such as the first of every month. Backe v. Novatel Wireless, Inc., 607 F. Supp. 2d 1145 (S.D. Cal. 2009).

New SEC Staff Guidance

The SEC's staff recently provided new guidance about Rule 10b5-1 plans in its Compliance and Disclosure Interpretations, which provide additional insight into how the rule may be interpreted by the agency's enforcement staff. Key points include:

Delaying Commencement of Sales Until Release of Nonpublic Information May Not Legitimize the Plan

The new guidance takes the position that a person may not rely on Rule 10b5-1 when he or she institutes a trading plan while aware of material nonpublic information, even if the plan is structured to delay all transactions until after the information becomes public.

Replacing a Trading Plan

The rule's affirmative defense is available only for plans that are entered into in good faith and not as part of a "plan or scheme to evade" insider trading laws. The SEC's staff has stated that this requirement will be assessed in light of all

relevant facts, specifically including the time period between canceling one trading plan and establishing a new one. This reinforces the advisability of observing a "cooling off" period between terminating and establishing trading plans. It also suggests that an insider should consider carefully the potential circumstances that could cause him or her to want to stop selling, and build those into the plan, so that sales can cease automatically rather than requiring the insider to terminate the plan when those circumstances arise.

Transfers to New Broker

In a timely development given the continued turmoil in the brokerage industry, the new interpretations also confirm that a corporate insider may transfer a long-standing 10b5-1 plan to a new broker, if the broker that has been executing the plan's transactions goes out of business—even if the insider knows of material nonpublic information at the time of the transfer. The transfer must be timed to avoid any cancellation of transactions under the plan, however, and the new broker must observe the plan's original terms.

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Note

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Business Law

The Fine Print of Directors' and Officers' Liability Insurance Policies

By Kenneth J. Ashman and Michael F. Arvia

The individual financial protection of director and officer (D&O) liability insurance was once thought to be completely unnecessary, but today the majority of Fortune 500 companies carry such insurance. It is particularly useful in defraying the massive costs from securities fraud litigation launched by disgruntled investors. But the extent of D&O insurance coverage is highly specific to the particular policy in question and similar cases often have different outcomes. Everything turns on how certain terms are defined, and, naturally, the insurer and the insured do not always agree.

What constitutes a "claim" is perhaps the most often litigated question for D&O

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insurance. In *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104 (Del. 2007), for example, AT&T sought reimbursement under several D&O policies for defense and settlement costs from two lawsuits against the company in 2002. The policies in question were "claims-made," which only provided protection for claims made during the policy period; coverage was triggered when the insurer receives notice, not automatically from the underlying occurrence. The policies also contained exclusions for wrongful acts and prior litigation. The insurers successfully argued at the trial level that the two lawsuits were related and comprised only a single claim, and that the wrongful acts alleged in those suits had been litigated in two previous lawsuits, thereby excluding AT&T's claim from coverage. But the Delaware Supreme Court disagreed. The policies defined a claim as a "written or oral demand for damages or other relief." *Id.* at 1107. The court determined that every cause of action alleged in a lawsuit that was based on a distinct group of underlying facts was considered an independent claim, and remanded the case for determination of the number of claims before determining the existence of coverage. *Id.* at 1108–09.

The other primary question about claims is when a claim arises. In *National Stock Exchange v. Federal Insurance Co.*, 2007 WL 1030293 (N.D. Ill., 2007), for example, the plaintiff argued that an SEC investigation constituted a claim and should have triggered coverage for defense costs, while the defendant maintained that there was no claim until there was a specific allegation of wrongful conduct. The court looked to the policy itself and found unambiguous language that provided a decisive answer. The policy defined a claim as "a formal administrative or regulatory proceeding commenced by the filing of a notice of charges, *formal investigative order*, or similar document." *Id.* at *3 (emphasis added). The court determined that an order to commence an SEC investigation constitutes a proceeding, and is therefore a claim, especially since courts must err on the side of giving meaning to every term in a contract; otherwise, the term "formal investigative order" would be superfluous. The policy also stated that a wrongful act includes an allegedly committed or attempted action, so the SEC's investigation into wrongdoing that may have been committed was enough to give rise to a claim. The court ruled in the plaintiff's favor, ordering Federal Insurance Co. to pay the expenses National Stock Exchange incurred on behalf of its officers and directors to defend against the SEC's investigation from the time National Stock Exchange received notice from the SEC of such investigation. *Id.* at *5–6.

What constitutes "loss" that is covered by D&O insurance is also the subject of much dispute between insurers and policy holders. In *CNL Hotel & Resorts, Inc.*

v. Houston Casualty Co., 505 F. Supp.2d 1317 (M.D. Fla., 2007), for example, the plaintiff sued for reimbursement of a settlement amount paid in a cause of action under Section 11 of the Securities Act of 1933. The policy defined losses as funds the company or its directors or officers were legally liable to pay from a claim insured under the policy, including claims expenses, settlement amounts, compensatory damages, and legal fees and costs pursuant to judgments. *Id*. at 1322. But the settlement the plaintiff paid was actually a disgorgement from unjust enrichment, and the defendant refused to reimburse, arguing that the restitution for ill-gotten gains was not a loss. The court agreed. While individual directors and officers are not necessarily precluded from recovering on a Section 11 claim, a settlement that is essentially the return of misappropriated money is not a loss and is not insurable. *Id*. at 1326.

Practitioners should examine carefully the language of D&O policies—both for their clients and for those companies on which the practitioner sits on the corporate board—and examine the language in light of the business in which the client operates. Does the client have a history of claimed violations under the securities laws, whether private claims by investors or governmental inquiries? In renewing a policy, has there been prior litigation that is likely to arise again in the future? Has the client paid "damages" that, in reality, amount only to a return of ill-gotten gains? It is these types of questions, and others particular to the client, that one must examine in determining the best carrier—in light of policy premiums—for coverage for the directors and officers of the practitioner's clients. It is the fine print of these policies that will determine whether coverage exists or is denied.

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LITIGATION

Top 10 Tips and Tactics for an Effective Mediation

By Michelle Clardy

What do I need to do for this mediation to be a success? That question is one a litigator should always consider when preparing for mediation. For each mediation, there may be a different measure of "success." If your case is in the early phases of discovery and you want to test the settlement waters, "success" may be learning more about the other side's positions on settlement and case strategy. Alternatively, you may have been embroiled in litigation for years in a very contentious case, and your definition of "success" may be getting difficult clients to see strengths and weaknesses of the case in a last effort before trial.

Regardless of your definition of "success," there are certain tactics and general preparation tips that help ensure you are prepared to effectively negotiate for your client. Although the tips that follow are by no means comprehensive, they are a good guideline of essentials to consider in any mediation.

10. Consider the Timing

Timing can be critical. If you want to look at early resolution of a case, a

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mediation might be beneficial prior to taking expensive depositions. Alternatively, if you've gone through the entire discovery process, mediation may be beneficial before trial to see if settlement can be reached to avoid the expensive costs of trial. That being said, mediation is not useful if neither side has any expectation or intention of settling the case. If the opposition suggests mediation and you know your client is absolutely against settlement, don't mediate. Doing so only creates further animosity and wastes time that could be used for discovery or trial preparation.

9. Be Prepared

It is important to convey to the mediator and opposing party that you are prepared and well versed in the facts and law of your case. Attorneys that are unprepared on those fronts are automatically behind in the mediation. You can't sell your position and case strengths if you don't know what they are. Take the time before the mediation to review and address key facts and issues of law.

8. Research, Research, Research A large factor in negotiating successfully for your client is doing the necessary research. What are you researching?

• *Research your mediator*: Determine the approach and experience you want from your mediator and ask peers about experiences with proposed mediators. It is important to ask not only about experiences with a mediator who has served in that capacity for other cases, but also to inquire about the mediator's prior legal experiences.

• *Research key legal issues*: Review cases for and against your position on key legal issues and be prepared to explain why your position is correct—having the cases with you doesn't hurt.

• *Research jury verdicts*: Conduct jury-verdict analysis for cases with similar facts to determine what verdict might be expected at trial. It's important to know if facts similar to yours resulted in a million-dollar verdict or summary judgment for failure to prove an essential element. Be prepared to distinguish facts or legal issues from jury verdicts you believe the other side will use in support of its damages analysis.

7. Use the Mediation Statement and Opening Statement

Use the mediation statement as a roadmap for the mediator. The mediation statement is your first opportunity to gain credibility and support with the

mediator. Be concise in your positions, and set forth the background facts, contended facts, legal theories, and defenses for the case. Also, anticipate and address the other side's positions. If the mediation statement is done well, the mediator will have a quick synopsis of the case and settlement positions.

The opening statement is one of the few times you will have the opportunity to speak directly to the opposing party. Use this to your advantage. Speak to the opposing party in your opening. Explain your positions, including both strengths and weaknesses of your opponent's case, and why at the end of the day you believe your client will prevail. Try to avoid being overly confrontational or accusatory. If your opening statement has only the effect of further polarizing the negotiation, you might as well go home.

6. Prepare Your Client

Before the mediation, meet with your client and go over your negotiation strategy, what you expect your client's role to be in mediation, and how the mediation process works generally. If you have a client that has never participated in mediation, informing your client of how the process works and what he or she can expect will help alleviate anxiety and keep your client focused on the settlement issues. Make sure you have authority, or are able to get authority, from your client during the mediation.

Many times insurance companies are involved in litigation. If the claims adjuster is not attending the mediation, communicate with him or her before the mediation and go over the strengths and weaknesses of the case.

Keeping the client and insurance company informed can only help the mediation process. Make sure in these discussions that you don't oversell your case. Giving your client a false expectation of the result will not help resolve the matter at the end of the day.

5. Play the Devil's Advocate

To be prepared for *any* mediation, you must give consideration to the strengths and weaknesses of your opponent's case. Try to consider what your approach would be if you were on the other side. What facts and legal theories would you emphasize? What would you try to negotiate as a settlement price? If you can look at the facts of the opposition and know its strengths and weaknesses, you will be better prepared to address and counter those facts in your negotiations.

4. Be Principled

This theory is one that cannot be overlooked in negotiating at any time, but particularly in settlement discussions. Be principled in your negotiating. What does that mean? If you make a counteroffer or demand, make sure it is because the other party has demonstrated something that you believe actually impacts the value of the case. Know and explain to the mediator and opposing counsel why you are making a counteroffer or demand. If you are mediating a case and you begin to go back and forth on the settlement numbers, you convey to the other side "I have a certain amount of authority, and I'm just negotiating price until I reach it." At that point, you've lost credibility and negotiating power.

3. Don't Be Afraid to Walk Away (or Continue Negotiations!)

If it is apparent from the settlement figures being negotiated that the parties are worlds apart, don't be afraid to end the mediation and walk away. It is only frustrating to both the parties and counsel to work on a mediation that has no chance of settlement.

Alternatively, if the parties are close to a deal, but it is the end of the day, agree to continue the negotiations for a week before reengaging in the litigation process. Doing so will give the parties a chance to consider their settlement positions and see if a final deal can be reached.

2. Use a Negotiating Approach That Works for You

Everyone has his or her own approach to negotiating. Some individuals are quiet and unwavering, others are loud and tenacious. Whatever your preference, know your negotiating style and use it to your advantage. Play to your negotiating strengths.

If you are the quiet type, use your steady approach to convey strength and conviction in your positions. If you tend for the more flamboyant approach, use your outgoing nature to intimidate. If you do tend to the more aggressive approach, remember you have an intermediate third party conveying your position. Don't be so aggressive that you irritate and alienate your mediator.

1. Listen to the Mediator's Observations

Mediation is the opportunity for both sides to hear their strengths and weaknesses. So, *listen*. If the mediator says, "Hey, I think you may really be in

trouble with your expert's report on the issue of fault," consider his position and reasoning. If the case doesn't settle, you can use the mediator's observations to conduct further discovery, amend pleadings, or supplement expert reports. If the mediation is right before trial, the mediator can be an invaluable third party to practice the persuasion of your trial themes.

Conclusion

Prepare for and use mediation for the negotiating tool it is—a great opportunity to learn more about your opposition's strengths and weaknesses, a chance to test trial theories on an impartial third party, and an opportunity to resolve litigation in a cost-effective manner.

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"Ten Things Your Expert Neglected to Tell You," by Francisco Ramos, Jr., 2009, *Commercial & Business Litigation*, available at http://www.abanet.org/litigation/litigationnews/practice_areas/commercial-tips-foreffective-mediation.html.

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LITIGATION

Preparing Your Witness in the Electronic Age

By Lisa Horvath Shub

Presenting a witness to testify can be a nail-biting experience for both lawyer and witness. Despite hours of preparation exploring the facts, ensuring that the witness is familiar with all the relevant documents, and warning your witness about the tricks opposing counsel may play, the witness, having his or her own strengths, weaknesses, thoughts, and opinions, has to answer the questions. When the witness takes the stand, your assistance to him or her is limited to objecting or attempting to halt improper questions and taking your witness on direct to ensure that the facts are presented more accurately if you believe one of the answers has left a misleading impression. But the facts are the facts. If you have not done homework newly necessitated by the electronic age before you present your witness, some facts about your witness that you did not know may surface because he or she neglected to tell you about them.

Your witness may not have a thorough understanding of how electronic information can play a role in the facts of his or her case. Or your witness may wrongly perceive what facts will be deemed relevant. Nonetheless, you can minimize surprises if you impress upon the witness the diligence that is likely to

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be marshaled to unearth information about him or her, the wealth of information that can be discovered, and how it may be used.

Mining the Internet

A Google search is always a good place to begin. The most obvious search term is your witness's name, coupled with his or her city and state to narrow the search. However, you may also get some hits if you include search terms as "lawsuit" or "verdict" to provide some background regarding the witness's litigation history. Including search terms that describe a witness's profession or a known interest may also yield results.

Internet social networking sites and personal blogs can be illuminating resources. Some firms have assistants and librarians regularly search such sites and blog postings as part of their duties. The amount of personal information posted on the Net is staggering to most lawyers, at least to those over 30. Posting personal information has become commonplace, and more than several anecdotes have been published describing witnesses (and jurors for that matter) who have posted information related to their litigation. Ask your witness if he or she has a MySpace or Facebook page. Ask if he or she has a blog. If so, review them diligently. Advise your witness that even if material has been removed, someone may have copied and forwarded it to friends, so that it may never really be "off" the Net. Make sure your witness understands that if he or she doesn't help you find any such information, the other side *will* find it. It is far better to find out what is out there than to have your witness blindsided on the stand.

Skating through cross-examination without a question about his or her blog or Net postings doesn't mean your witness is out of the woods. Although consulting outside sources will be against the court's instructions, jurors oftentimes take it upon themselves to see what they can find out about a witness. If your opposing counsel did not find information, your witness should understand that a juror still might do so. The juror may use that knowledge privately in his or her decision making. Indeed, in some jurisdictions, courts allow jurors to pose questions to witnesses. If the witness has a website, tell him or her to expect questions related to those postings.

Does your corporate representative witness know what is on its company website? Has he or she explored how the company's products or services are advertised online? Online promotional materials commonly vary from the hard copy. If your witness knows what promotional claims are made, he or she will be better positioned to investigate the basis for those claims and provide the

testimony necessary to support those statements if opposing counsel attempts to attack them.

For experts, in addition to testifying histories and articles authored, credentialing information—or lack thereof—can often be found electronically through professional certification websites. Nothing is more disheartening than discovering that an expert in whom you have invested much time and energy has let their board certifications lapse, especially if they have represented otherwise. Check out your witness's CV, and use the online certification websites to verify well before your expert takes the stand.

Numerous more specific websites, including state and county court sites, state department of public safety sites, Lexis-Nexis, and Westlaw provide access to public records. Even if your witness tells you nothing is floating around cyberspace, "trust but verify." It is worth your time to check the sources that might exist, just to make sure.

E-mail, Metadata, and Beyond

While most of us now know that "deleting" your email does not necessarily delete a file altogether, witnesses may not be as knowledgeable. Conversely, they may know email can be found but think that opposing counsel will not expend the effort to retrieve that information. Enlightening your witnesses to the realities of electronic discovery—and a party's obligation to produce documents, even if in electronic form—may cause them to be more candid. It may also lead them to word their email more appropriately in the future. Question your witness about email communications. Make sure you and the witness are aware of any applicable document retention policies and practices. Encourage them to search their memories, and of course, work with you to collect any such documents you are obligated to produce during discovery. Pretending email does not exist will not make it go away. Knowing what is there will help your witness be prepared to answer any questions.

If your witness transmitted documents electronically to the opposing party, did the documents contain metadata that may indicate changes in position and thinking? If you have a document intensive case, is that information that you need to review? Perhaps. But it is likely worth your time to find out if the parties ever communicated in this way. Opposing counsel may have questions related to the dealings of the parties that are not readily apparent in the final correspondence. Ask the questions. Ascertain whether it is worth the time and

expense to explore further.

The amount of information available through electronic media gets larger every day. Explore with your witnesses, and without them, what may be out there. Then use that information to counsel your witnesses before they raise their right hands to testify. Minimizing surprises will make your witnesses more comfortable and hopefully ensure that they are able to more calmly—and therefore more persuasively—tell their side of the story.

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"Preparing Your Witness in the Electronic Age," by Lisa Horvath Shub, 2009 *TortSource*, p.1.

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FAMILY LAW

Discovery—Not a Job for Christopher Columbus

By Donald A. Glenn

The billionaire T. Boone Pickens once said, “An idiot with a plan can beat a genius without a plan.” In a divorce case, discovery is not a job for a financial explorer out to “discover the world.” Discovery is the most time-intensive and expensive phase of a family law case. It requires a lawyer and CPA working together on a focused assignment with a plan tailored to the facts of the case.

In looking back over my own cases with good outcomes, I find that effective discovery most frequently occurred when we worked with our regular referring attorneys and had adequate time to prepare. But the best work required more. In further post-game analysis, two conditions were present in our best outcomes: (1) Good communication with the attorney, and (2) a comprehensive discovery plan. Discovery is not fun or exciting, but it does deserve coordinated attention.

The Discovery Plan

• Past Issues

Discovery planning requires a general plan for the entire case. A small amount of up-front planning saves time and is more likely to lead to successful discovery. The first step is to understand the players. Attorneys are like college students who have a habit of working in spurts, such as writing term papers the night before they are due. They rely on their substantial memories to manage data. CPAs are like college science nerds. We love the science project and continually tweak it until it is perfect. The client wants to win, but is concerned about balancing the costs of the case with predictable results. It is amazing that clients do not understand the relationship between costs and results in their own case. Involving clients in discovery planning helps them better understand the inevitable costs because they are generally involved from the beginning and they provide the initial sources of information.

Basic Process

Developing a plan starts with issue identification. These issues relate to the legal concepts, which the attorney will define for the client and CPA. The definition will include who has the burden of proof for each issue. If your client has the burden, discovery will probably be more detailed but of the shotgun variety. If your client does not have the burden of proof, then discovery may be minimal and designed to determine if the spouse has the requisite documents to prove the case. Discovery may be postponed, minimal, or in phases if it is not desirable to have the other side begin early preparation of documents. Finally a discussion of what is necessary to prove or to rebut each issue should establish the basic case and discovery goals.

Document Management

Family-law discovery often is less formal than general civil litigation. This poses problems if evidence suddenly appears at settlement conference or trial. Keeping accurate records of the discovery provided and what is missing becomes important. Generally our first order of business is to decide who will be responsible for physical custody of the case records. In small cases, it may make sense to have copies made for both attorney and CPA. But in large, complex document-intensive cases, this is expensive and wastes the professionals' time, which may be better spent on other aspects of the case. In these cases, we use document scanning, electronic retrieval, and then share documents with counsel. This allows us to retain the records in their original state, which may be necessary if compliance with discovery is later questioned. Key to the process is a logical and simple index that facilitates quick storage and retrieval of documents.

Standard Discovery Documents

Family-law attorneys develop discovery templates for issues commonly encountered in their practices. Local rules may require standard interrogatories or other discovery. Lawyers have a tendency to send out standard templates as the first round of discovery, but a little customizing of the first set can pay significant dividends. It forces the team to focus on issues and seek early input from the client and other public sources, such as the Internet. On occasion, well-crafted early discovery can have the additional advantage of facilitating settlement discussions.

Business Valuation

The family-law attorney and CPA should work together to formulate discovery questions. To CPAs, the most efficient method of gathering data for business valuations is a questionnaire that combines questions with a document request keyed to the answers to each question. For example "Do you lease the business or other property? If yes, answer the following questions and provide copies of all current leases." CPAs generally have standard business valuation questionnaires. CPAs' questionnaires are generally not in the same form as a demand for documents or interrogatories, but they expedite and streamline discovery if the parties will stipulate to providing information in this format, including a certification. If a party refuses this efficient approach, the attorney will have to convert the questionnaire into a format acceptable for formal discovery requests. Experienced forensic CPAs often have formal discovery requests in addition to questionnaires. If formalities are observed, the normal tendency is to prepare exhaustive discovery requests. This escalates the case, puts a large volume of documents into play, and increases costs.

I suggest another approach: three separate rounds of discovery. The first round will be a standard template of interrogatories and a streamlined document request for basic business records (our document request is a page and a half). After receipt of the first answers and documents, a preliminary work-up of the value can be performed. The initial work-up generally identifies issues requiring additional discovery. The second round focuses on issues and questions posed by the first round. These questions are customized and focused. After analyzing the second round of material, a third round may be written or incorporated in a site visit with interviews if possible. If no site visit is possible because the business spouse refuses to cooperate, you may schedule the deposition of the in-business spouse and, in large companies, other company members as well. Depositions to determine facts related to reasonable compensation, business risks, even basic ownership or control of the company are sometimes necessary.

CPAs may have a list of standard deposition questions and may be helpful in mapping out topics and subjects for depositions. If your CPA does not have a standard list of deposition questions, ask your expert to prepare a list of questions for each deposition. It can be very useful to have the CPA attend the deposition.

Many cases do not require a third round of discovery. If the three-rounds method is used, it can be helpful to advise opposing counsel of the three-part process. This can head off claims of abusive discovery. One weakness of this method is that it cannot be used unless adequate time is available and counsel is willing to pressure compliance with discovery deadlines.

Separate property and tracing. With separate property claims, the party asserting separate property (separatizer) has the burden of proof. It can be a heavy burden, depending on the type of property, cash or real property, and state rules. Discovery is designed and functions differently depending on whether you are asserting or defending a separate property claim.

If asserting a separate property claim, discovery is designed to discover and obtain information and records to prove the assertion. Conduct discovery of this type as quickly as possible. Sometimes when parties separate, records are destroyed as the parties move or engage in spring cleaning. If possible, have the records removed from the residence or other location, inventoried, and stored for use by the parties. A CPA's assistance can be critical to collecting and inventorying materials and serving as custodian of records.

If defending against a separate property claim, discovery should first determine if the spouse has sufficient proof to support the claims. Separatizers typically make unsupported, and sometimes detailed, arguments of the history of their separate property claims. Their experts sometimes reflect these unsupported arguments in professional looking schedules and analysis. All too often, a lack of inquiry lends credibility to these presentations without supporting proof. Sometimes these unsupported schedules allow settlement of significant separate property claims that could not survive the crucible of trial. Discovery should seek to establish that sufficient documents are missing and unavailable to prove some or all of the separate claims.

Investigations

Investigations are the most difficult part of discovery, particularly when fraud is present. When alerted to the possibility of discovery, the fraudsters will destroy or place out of the reach of a spouse information and documents that will prove

the fraud or establish the existence of undisclosed property. To prevent alerting the fraudster, get a court order or make an ex-parte motion to initiate discovery. Serving orders may require the assistance of the sheriff or marshal. Private investigators may be required to assemble evidence justifying court issued ex-parte discovery orders.

Once initial discovery is completed, planning is required to develop the best return on the available evidence. If necessary, request additional discovery of third parties. All involved should occasionally ask whether a strong likelihood still exists that a goose really is at the end of the wild goose chase.

Protective Orders

Privacy issues often are raised in response to objections to discovery requests. A common resolve results in a protective order. Protective orders generally focus on a party's related persons or companies. There is little consideration given to their effect on the spouse's attorney or CPA. They often are so restrictive that if a spouse makes a claim against either or both of the professionals, the protective order may preclude access to proof needed in an E & O defense. An experienced expert usually can work with protective orders by returning documents to a third party to be held for a period of time. In the event of a claim, the documents would be available to the CPA (and attorney) to defend themselves. CPAs should protect themselves by specifying in the engagement letter that the client must reimburse for fees and costs associated with protective orders. CPAs do not want to take on the financial responsibility of defending against a protective order. If protected information is sought, consider requiring the CPA to provide only notice to the client. The client can then decide if enforcement of an order is appropriate. Some proposed protective orders are so onerous that they will prevent a CPA from completing an assignment with acceptable risks. Requests for unreasonable orders can usually be resolved by the court to everyone's satisfaction. If not, the CPA may decline the assignment.

Conclusion

The cost of divorce has increased over the years. Were it not for technology, divorces would be even more expensive. Family-law discovery can cover a wide range of subjects, probably more than any other area of the law. On your next case, invest an hour or two in a discussion about discovery with your client and CPA. Consider who will draft requests, who will receive copies, whether electronic storage should be used, how many requests are anticipated, and, in light of case issues, developing a written discovery plan. Plans need not be fancy, just effective. Discovery may be one promising area of family law in which a little planning can lead to better results at lower combined fees and costs for the

attorney and CPA.

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Bright Ideas for Drumming Up Clients 24/7

By David C. Sarnacki

Bold ideas and practical tips for business development

Practical Tips—Client Maintenance

Set forth a consistent and professional image. Clean your office of files and unnecessary clutter. Don't make clients wait for more than five minutes. Make sure your entire staff projects that the client's legal matter is of utmost importance to you and everyone in the firm.

Monitor your receptionist for impeccable service and manners. Call the office frequently to see how clients are greeted (delays, number of rings, etc.). Make sure the receptionist knows when a client is expected and greets him or her warmly and by name.

• Past Issues

Communicate clearly and regularly with clients. Talk with them in person and over the telephone. Send letters and handwritten notes. Put clients on the mailing list for newsletters or other firm communications. Have breakfast or lunch with them. Always return client telephone calls as soon as possible or within 24 hours. If you are unavailable, have a staff member do so. Smile when you answer the phone-you can't help but sound more pleasant. Don't use a speaker phone unless absolutely essential.

Review all correspondence (letters and envelopes) for layout, presentation, typos, and overall flow. Make sure the client receives a "clean" copy of all pertinent documents and correspondence and include a folder, imprinted prominently with your name, address, and telephone number. Place "Drafted by _____" on all instruments you draft to show pride in your work and then encourage the client to contact you with questions or changes.

Keep your promises. When you tell your client a project will be completed by a certain date, meet or exceed that date and your client's expectations. Occasionally offer to meet at the client's office, instead of your own. Order a subscription to a trade publication that focuses on your client's business. Consider doing business with clients—use their services and products.

Send thank-you notes to acknowledge your retention; a card or newspaper clipping to congratulate a client on an award, promotion, or speech they've given; birthday, holiday, and special-occasion congratulatory cards to clients and former clients. Include clients' family members. Send announcements to clients regarding new legal developments or your own continuing legal education and advancement as well as notes on recent changes to the law or new cases that might be of interest to your client. Always send a sympathy note when someone you know dies.

Ask yourself, "What is one thing I can do today to improve the quality of service to my clients?"

Provide written fee agreements to clients. Make sure that regular invoices are understandable. If unexpected events increased the fee, include a note or suggest a conference to discuss it. Consider sending a note to detail work in process or how you are saving the client money. Send thank-you notes to acknowledge prompt payment.

Throughout the case, ask clients how you are doing. How are the firm's services? The billings? The quality of work? The client's relationships with people at the firm? Is there anything more the client wants from the firm?

Send thank-you notes to acknowledge prompt payment.

Create a client survey and make it available in the reception area or during the initial interview or mail it to the client. Make sure the client understands that the survey is voluntary but extremely helpful and may be submitted anonymously. Invite the client to describe what you do well and what you do not do so well. Then thank the client at the end of the case.

Practical Tips—Cross-Selling

Prepare and rehearse an answer to the often-asked question, "What kind of lawyer are you?" Be sure your answer includes that you can help with any legal problem, either directly or through referral to someone inside or outside your firm.

Tell clients at every opportunity of the range of legal services you or others in your firm provide. Let clients who own businesses know the full range of legal services you provide and can make available to their employees. Inform clients of other services you or your firm can provide directly or through referrals to nonlegal experts, such as investment or insurance service providers.

Say "no" to cases that are not good for you. Many lawyers hate to say "no" for fear of losing clients. Learn to recognize the types of cases and clients that will stretch your resources and compound your stress. (To find out who those are, see Powers & McNalis, page 8.)

Practical Tips—Targeting

Create and maintain a complete and up-to-date mailing list of past, present, and potential clients and schedule regular contact with some of them each month.Treat these appointments as seriously as court dates. Face-to-face meetings are essential.

Develop a biography of important clients, potential clients, and referral sources and record for them significant information, relationships, important dates, interests, and activities. Identify a minimum of one new business contact per month with whom you will have lunch.

Consider writing witnesses after a trial to thank them for their cooperation, time, and service. They may remember you when they need a lawyer in the future. When a client needs a witness for a legal document such as a will, invite

them to sign the document in your office. Then write the witnesses to thank them and to focus their attention on the importance of having a will of their own.

Practical Tips—Referral Sources

Treat everyone as a potential client or referral source. Emphasize to all clients that you make time for referrals. When asked "How's business?," never tell a client or potential client that you are "too busy," which could be interpreted as being too busy to handle a new matter properly.
When a client needs a witness for a legal document, invite them to sign in your office

Entertain lawyers and others who are in a position to refer clients. Ask colleagues if you can provide assistance to them and apprise them of your full range of legal services. find out when your class reunion will be held and plan to attend. Give a stack of your business cards to your spouse to hand out to friends and acquaintances who mention a legal matter.

Write a "thank you" note when anyone refers business. Make an effort to reciprocate, and whenever you refer business, even if the potential client never contacts your referral, let that lawyer know by telephone and in writing that you referred the matter.

Practical Tips—Professional and Community Activities

Get out in public. Join organizations and attend luncheons and other events. Participate in activities that (a) allow you to meet the types of people you seek as clients; (b) promote a political or social interest you care about; or (c) enhance the quality of life in your community.

Let people know you are a lawyer and always carry business cards. Select a community activity with a long-range perspective. Seek leadership positions and become identified with the organization. Participate in bar associations. Become known among local attorneys and participate in activities that enhance the legal profession, including the delivery of pro bono services.

Sign up for a continuing legal education course in your field or a different one. Make an effort to meet other attendees, especially those who practice in different fields or other cities. Follow up and keep in touch with those attendees and attempt to refer business to them. They may later refer business to you.

Write an article to demonstrate your expertise in a particular field. Consider the audience you want to address (e.g., lawyers, a specific industry, the general public). Go the extra step. Whether the activity relates to a community organization or a bar activity, volunteer for projects and treat them as if they were client matters.

Practical Tips—Collaboration

Collaborate with another attorney in your firm on a joint marketing project, such as a seminar, luncheon, presentation, article, or other activity.

Help associates learn the art of rainmaking and the importance of networking by encouraging them to bring into the firm the smaller matters of friends and relatives. Actively support associate efforts in referring clients to the firm and pro bono programs. FA

Big Ideas

Big Idea 1: Do Something

Invest your time and talent now, but adopt a long-term perspective for rainmaking results. Develop relationships with potential clients and referral sources. Choose activities you care about. Develop goals and action plans. But don't just stand there—get moving.

Big Idea 2: Keep Clients Happy

Communicate clearly and regularly with clients. Ask them how you are doing then listen. Discover their needs and concerns. Respond promptly. Ask yourself, "What is one thing I can do today to improve the quality of service to my clients?" Keep your promises and exceed any expectations you create.

Big Idea 3: Create Opportunities for Getting New Clients

Treat everyone as a potential client or referral source. Let people know you are a lawyer and always carry business cards. Schedule regular contact with past, present, and potential clients each month. Tell everyone that you always make time for referrals. The more opportunities you create, the more likely that one of those contacts will actually call for an appointment.

Big Idea 4: Go the Extra Step

Treat your professional and community activities as if they were client matters. Target your efforts and have a reason for investing your time and talents where you do. Get out in public. Meet the types of people you are seeking as clients, promote a political or social interest you care about, or enhance the quality of life in your community. Write an article to demonstrate your expertise to the client-audience you want to reach. Participate in bar associations and become known among local attorneys as one whose efforts enhance the legal profession as a whole. In everything you do, lead, follow, or get out of the way.

Big Idea: 5 Smile

Life is short. Celebrate the moment, at least once in a while. In the words of Mother Teresa of Calcutta, "Smile at each other, smile at your wife, smile at your husband, smile at your children, smile at each other—it doesn't matter who it is—and that will help you to grow up in greater love for each other." Then you'll be refreshed enough to go back to Big Idea 1 and start all over again.

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"Bright Ideas for Drumming Up Clients 24/7," by David C. Sarnacki, 2006, *Family Advocate*, 29:2, p. 18.

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Making the “Must Move” Case at Trial

By Jacqueline M. Valdespino

When trying a case in favor of relocation, it is imperative to address the parties’ fears and present concrete solutions or alternatives that minimize the negative impact.

The most difficult relocation cases are those in which both parents are involved in all aspects of the child’s life; the parent who is left behind will suffer a great loss and feel as if his or her ongoing parenting efforts are not being valued. The truth is that whenever a move involves a distance that will affect the custodial arrangement and/or contact and access schedules, sacrifices will be required.

Consider the following fact pattern:

The parents meet while attending medical school in New York where they have both lived their entire lives. They pursue residency programs and both receive job offers in Miami, Florida. They marry and move south.

• Past Issues

After completing their residency programs, they settle into careers; Dad pursues pediatrics, and Mom is an eye doctor at a local hospital. Mom is in the office from 9:00 a.m. to 5:00 p.m. with very few on-call hours. Dad is in private practice with early morning hours twice a week.

They have a son; Mom takes six months' maternity leave, and they hire a live-in nanny. When the child starts preschool, Mom takes him daily. Dad adjusts his office hours and picks his son up three times a week, attending to him until Mom gets home. Then Dad returns to work, extending office hours to meet his patients' needs. The nanny picks up the child from preschool when Dad is unavailable.

On weekends Dad coaches soccer; Mom attends every practice and game, providing the team with snacks and drinks. The family returns to New York regularly and has strong relationships with family and friends there. The paternal and maternal grandparents, as well as aunts, uncles, and cousins on both sides live in New York, and the child enjoys a close relationship with his extended family.

After ten years of marriage, the parties separate. As part of her petition for dissolution of marriage, Mom seeks primary residential custody of their six-year-old son and permission to relocate to New York where she has been offered a job in her field, doubling her income. Dad objects to the relocation and seeks primary residential custody.

The first step in preparing any relocation case for trial is to interview the client extensively and read all documents relevant to the case: final judgment of dissolution; marital settlement agreement; postdissolution pleadings and orders; employment search records and offers; attempts to seek employment in the current jurisdiction; the child's school, medical, and extracurricular records; journals or calendars documenting past visitation, etc. Next have the client prepare a list of potential witnesses with a synopsis of each witness's testimony.

Relocation cases rarely settle out of court because the advantages of the move to the relocating parent and the disadvantages to the nonrelocating parent are perceived as paramount and insurmountable by each of them. The relocating parent often seeks to move because of a career opportunity (the parent's or the new spouse's), better benefits, or enhanced earning capacity. If that parent declines the move, sacrifices are far-reaching. The parent who stays behind feels the loss of the right to raise the child and argues that involvement is not adequately replaced by infrequent, although extended, visitation.

In trying the case in favor of relocation, highlight the advantages and downplay the disadvantages by providing solutions or minimizing negative consequences. Encourage your client to attempt to negotiate an agreement governing the move prior to filing the petition. Depending on the jurisdiction, evidence of such efforts may be relevant at trial or on the issue of attorney's fees and costs.

Know the Law

Pay Careful Attention to the Burden of Proof

If the petition for relocation is presented during the initial dissolution proceedings, rather than as a petition for modification, the burden of proof may be different. Some states have a clear policy opposing relocation requests. Learn your state's standards. Does the burden shift after the parent seeking relocation demonstrates that the reason for the move is valid? Educate the judge on which parent must carry the applicable burden and demonstrate how it is that your client carries it or that the other parent has failed to do so. Highlight any presumptions that may fall in your client's favor.

Before filing, know what procedures must be followed in your jurisdiction. In some states a petition for relocation requires the nonrelocating parent to seek custody if he objects to the relocation. Is your client able to defeat a request for custody by the other parent? What notice requirements does your state impose on the parent seeking relocation? If your state imposes one, make certain that your client complies in a timely and complete manner. Notice is generally required in advance of the move.

In addition to knowing the specific law on relocation, familiarize yourself with evidentiary rules. To authenticate e-mails, Web site material, or chat room evidence use the same standard and procedure as for any other type of documentary evidence. Under the Federal Rules of Evidence, documents must be authenticated properly as a condition precedent to their admissibility "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Pursuant to Rule 803, you may be able to overcome a hearsay objection by arguing that the contents of a Web site are a public record or report. Many Web-based records also may be admissible pursuant to the business records exception to the hearsay rule. As an alternative, counsel may stipulate to the admissibility of Web material after providing the URL. Attempt to resolve challenges to admissibility in advance of trial so as to avoid lengthy evidentiary battles during the testimony.

Each state has different factors that judges consider when presented with a

request for relocation. Research the law carefully and address each factor. Although factors vary, some of the most common are:

Is the Move in the Best Interest of the Child?

The more clearly you present evidence of a better life in the new location, the more likely the trier of fact will find that the new home will serve the child's best interest. Highlight all advantages of the move. Concentrate on better schools, a bigger or better home, a nicer community/neighborhood with children the same age as your client's, less traffic, less crime, the availability or affordability of extracurricular activities for the child, the ability to continue activities, such as ballet or karate, without compromising previous achievements.

Nothing will make a greater impact on the court than a visual presentation of the proposed location. Introduce into evidence and play for the court a video of the new community. If your client can afford it, have it filmed professionally. But remember, the videographer must be called to testify in court to properly introduce the video into evidence.

If a video is not financially feasible, use photographs. Consider putting the photographs into a PowerPoint presentation so that images can be projected onto a large-screen format. Have the judge "see" the school, community, parks, and proposed new home while your client testifies. Make sure that the visual presentation is rehearsed and that you verify that the video equipment works in advance of trial to avoid any glitches.

Explain that the child will continue religious education and practices in the new community and have your client commit to continuing religious training, particularly if the relocating parent and child have different religious affiliations. Ask the priest, minister, or rabbi if he or she would be willing to meet with your former spouse to discuss the child's religious training. If the parent and child have different religious affiliations, this factor may gain importance, particularly if the parent who stays behind has been active in the child's religious upbringing.

Religious Education

Prepare your client for cross-examination regarding a commitment to the child's faith. Have your client research available houses of worship, service schedules, and any religious preparation that may be available for the child.

One benefit of a move may be that the child can more seriously pursue a sport that could lead to a college scholarship. For example, a move from Miami to

Boston would benefit a child's passion for hockey. If this is the case, have your client introduce into evidence all documentation, including the cost of the extracurricular activity.

If your client has been the "psychological parent," show that he or she is and has been the primary nurturer and, therefore, that relocating with this parent is in the child's best interest. Highlight the stability of the parent/child relationships with each parent. If the other parent has been heavily involved since notice of the relocation was provided, as opposed to previously, point that out.

If the reason for the move is proximity to a support system, demonstrate how this support system will serve the child's best interest. If after-school care will be provided by the extended family or the child will be transported to and from school by extended family, have your client testify as to the specifics. If the minor child has routinely returned to the locale and the parents have promoted relationships with long-distance family members, be certain to present this as a "family plan" that would be promoted by the move. In the above example, the move would nurture relationships with extended family, including grandparents on both sides.

If health concerns may impact the move, be certain to introduce all relevant medical documentation. Provide the court with the proximity of health-care providers, including experts in the field. Research whether the current health insurance can remain in place and, if not, the availability and cost of a new policy.

If there has been ongoing postdissolution hostility between the parents, it may not be in the child's best interest to remain in the geographic area where the negative impact may be greater. Consider introducing evidence of your client's attempts to resolve conflicts. Call teachers or school counselors to testify as to the child's school record. If the child's grades or social interactions have changed, tie any decline to the conflict and argue that distance between the parents may help improve their relationship and the child's performance in school.

Be creative and clear in your presentation of the better life the child will have in the new location. This one factor often tips the scale in favor of relocation.

What Is the Motive of the Parent Seeking Relocation?

The court will not reward a parent who is disingenuous in seeking to relocate. Generally, a history of postdissolution litigation or an ongoing acrimonious relationship between parents will be used by the other side as evidence of the

past relationship to impugn relocation motives. To prove that your client's motive is genuine, introduce evidence that your client attempted to settle visitation issues before filing.

Interview your client carefully regarding motives and give guidance as to the impact of particular motives on the court. Find out what, if any, steps have been taken in furtherance of the move. Has the home been sold or the rental agreement altered? Has the child been enrolled in a new school or the current school notified of the move in advance of the noncustodial parent? These actions may prove fatal as they give credence to the notion that your client attempted to move without requisite permission or approval.

If your client has acted as if relocation is a forgone conclusion, his or her motive for doing so may be suspect. Consider hiring a mental-health professional to uncover any underlying issues before the court must rule on your client's credibility. Attempts to move without notice or permission could be fatal to your case.

Present evidence of your client's attempts to resolve a troubled relationship with the other parent, including attending therapy. If resolving a fractious coparenting relationship is the primary motive for the move, it is unlikely that the court will allow the move unless your client has taken steps to resolve the problems in counseling.

If your client has remarried, ask questions about the stability of the current marriage. Inquire specifically about domestic violence; check police and court records to ensure that the police have not been called to the home or that there have not been previous requests for protection. A court is unlikely to allow a child to move with a new family in which domestic violence has been documented.

If the motive for the move is a new job or a transfer with the same company, call the employer to confirm the terms of the offer and that the transfer is mandatory. Establish the income and benefits your client will receive in the new location. If the reason for the move is an economic one, be certain to tie the increase in funds to the child.

Your client must persuade the court that his or her motives are legitimate. Have your client assert all reasons in the hopes that the scale will tip in favor of the move.

To What Extent Have Contact and Access Been Allowed and

Exercised?

If the noncustodial parent has not exercised all available timesharing in the past, make certain that your client and the other parent testify to that. Prepare charts showing how much time was forfeited; include tardy pickups and/or early drop offs as those too result in lost time. Where applicable, present evidence that your client has offered contact over and above the scheduled time. Graph the contact exercised in the past and compare it with the proposed schedule. It may very well be that the new schedule actually provides more contact and access.

Will the Substitute Contact and Access Schedule Be Adequate to Foster the Parent/Child Relationship?

This factor presents a difficult challenge as almost every relocation will result in less frequent contact between the nonmoving parent and the child. Your presentation to the court must focus on how the parent-child relationship will continue despite the distance.

Assuming that the child is old enough to have established a parent-child bond and that he or she understands that distance does not mean a parent ceases to exist, present expert testimony regarding the child's psychological development. Obviously, a move with a child younger than three years old who has not established object permanence presents more challenges. Have your expert explain the scientific data on child development and why distance alone will not compromise the existing parent-child relationship.

Your client needs to know from the inception of the case that if a geographical relocation is granted, the child will spend most summer breaks as well as most extended school breaks with the other parent. Your client will assume 100 percent of the day-to-day school, extracurricular, and medical responsibilities for the child, whereas the other parent will share most of the "fun" time. Thus, your client's relationship with the child also will change. While both parents have lived in the same locale, the burden of daily childcare has been shared. The proposed move will require the relocating parent to carry the full load.

Remember, if the court denies relocation with the child and your client must nonetheless move or if in your state a denial of the request triggers a change of custody, the visitation offered might be the visitation received. Offer more visitation than the court is likely to award. On direct examination, your client should testify that the stay-behind parent should have the child for at least 70 percent of the summer and 100 percent of spring break and Thanksgiving weekend every year. In addition, since most schools have at least one long weekend a month, offer those weekends as well. Highlight that while the contact

may be less frequent than in the past, the extended periods allow for more quality time.

Offer the other parent the ability to travel to the new home for visitation on short notice. With respect to "contact," offer to have a private telephone line with a toll-free number installed in the child's room, a computer with Internet access, e-mail, and other conferencing software, a scanner or fax to e-mail homework, projects, or report cards.

Many schools now offer online services for parents to review student assignments and contact teachers; if the new school provides such interaction, be certain to present evidence of it to the court, explaining that it will serve as another level of "contact" between parent and child. Explain that although virtual visitation is not optimal, it is adequate to keep the stay-behind parent connected with the child. Making these offers also shows that the move is not motivated by an intent to frustrate the other parent's contact rights.

Can the Parties Afford the Transportation Costs?

Your client will need to assume some, if not all, of the transportation costs. Sometimes child support is reduced to meet the cost of exercising contact and access.

If the new home is within driving distance of the other parent's home, your client should offer to drive at least some of the time. Driving times are often unpredictable. Consider hiring a private investigator to drive the route from the new home to the other parent's home on random days that correlate to the expected visitation days. Have the investigator testify as to when he drove the route, the distance logged, and the time it took, as well as driving conditions.

If airline travel is required, hire a travel agent to testify as to the average cost of airline tickets as well as the frequency of the routes between the two locations. Address any seasonal changes or restrictions in airline travel between the two locations. Check with airlines to determine if the child is of sufficient age to travel as an unaccompanied minor and remember to factor that cost into travel expenses. (For general rules governing unaccompanied minors traveling alone, see Eisel page 28.)

If the stay-behind parent conducts business in the proposed location, argue to the court that the parent can travel to the jurisdiction without incurring added expenses. If your client's new home has a guesthouse, offer accommodations to the stay-behind parent at no charge during visitations with the child. The goal is to show the court that your client is willing to shoulder the cost and/or

responsibility of transportation to accommodate visitation.

What Is the Child's Preference?

Most jurisdictions do not allow children to testify. Even if your jurisdiction allows consideration of the child's preference, such testimony requires a finding that the child is of sufficient age and maturity to express a preference worthy of consideration. The challenge here is how to present the child's preference to the court. Consider seeking the appointment of a guardian ad litem who may testify as to the child's preference. If your jurisdiction limits a guardian ad litem's testimony and the report by the guardian is subject to hearsay rules, consider stipulating to the child's preference.

Will the Move Enhance the Standard of Living of the Custodial Parent and the Child?

Here you should focus on the limitations of the current location. Perhaps your client cannot afford to own a home if required to remain in the current jurisdiction. If the demographics of the new community are more cosmopolitan or diverse than the current one, emphasize social opportunities the new location will afford. Perhaps the child will learn a foreign language and/or be exposed to different people and cultures.

Research schools and day-care providers; present testimony on the differences between the schools/day-care providers in each locale highlighting the shortcomings of the current school/provider. Get statistics on classroom sizes and the ratio of students to teacher. Find out how many teachers in each school have postgraduate degrees. Determine if the schools have won awards. Compare curriculums and standardized test results. What types of extracurricular activities and competitive sports are offered at each school. If the child is in high school, get statistics on how many students are admitted to Ivy League colleges, four-year universities, and community colleges.

If the child is going into middle or high school and must change schools, present evidence showing how many classmates are likely to go with the child to the new school. By showing that the child will, in any event, have to make new friends, the court may find that staying in the current locale to preserve peer relationships is less important.

Prepare demonstrative graphs comparing the cost of maintaining the family's lifestyle in both places. If the noncustodial parent's child support payments are routinely late or minimal, emphasize that payments are not enough to sustain the predissolution lifestyle.

The new location may have a higher cost of living; however, your client may have free housing with family or a support system that would provide day care. Perhaps the public school is better than the private one thereby reducing monthly expenses even further. The move may result in significant reductions in costs and may lead to major savings, allowing resources to be funneled to other needs.

Investigate the crime rates in both locations; highlight violent crimes or crimes against children. Remember to check the registry of sex offenders in both locations. Argue that the other parent only opposes the move because of a desire to remain in a superior financial position.

Once Outside the Jurisdiction Is the Nonresidential Parent Likely to Comply With a Substitute Contact and Access Schedule?

Generally speaking the best measure of future behavior is past behavior. If your client has not denied the other parent contact in the past, your client's ability and/or willingness to comply with the substitute contact and access should not be questioned. If the opposite is the case, offer to post a bond to secure compliance. (See "Child Custody Bonds" on page. 42.)

Returning to our fact pattern, it was important that Mom, who sought permission to relocate, acknowledge that being separated from his son was heartbreaking for Dad. Mom testified that she understood that Dad was a great father; in fact she acknowledged that they made a good team and that she expected the teamwork to continue irrespective of the distance. She also testified that she knew that he would continue to be a great dad, and she would do everything to ensure his involvement. She facilitated that involvement by offering substantial visitation.

In our fact pattern, finances were a nonissue. Mom found a home in an upscale suburban community with a guesthouse, which she offered to Dad whenever he flew to New York for visitation. She provided a toll-free telephone number with a private line in the child's room as well as a computer with Internet access. She declined to provide a Web cam for video conferencing because of recent reports involving the misuse of such devices by child sexual predators.

She researched and agreed to purchase interactive games that father and son could play in real time over the Internet as well as a scanner for sending the child's homework, report cards, progress reports, artwork, and other documents to his dad on a daily basis. Mom agreed that Dad could check and sign homework and e-mail it back after scanning it with his signature. Mom also

suggested that Dad could accompany their son on field trips whenever his schedule permitted. Since Dad was in private practice and testified as to his ability to manipulate his schedule, the court was persuaded that he could accommodate considerable contact and access in both Miami and New York.

The fact that both extended families lived in New York also tipped the scales in favor of relocation. Mom testified that she would allow their son to spend time with his paternal relatives; including on Jewish Holidays so that he could participate in traditions celebrated by his dad's family.

With a heavy heart, the court granted the request for relocation.

When a parent seeks to relocate with children, there is always a loser. Even in the above example where Mom was so accommodating, Dad would feel the real loss of not being able to read a book to his son every night and tuck him into bed. Dad could no longer pick up his son from school routinely and coach his soccer team. For Dad the loss of participation in his son's day-to-day activities and of spontaneous contact was heartbreaking. The fact that the motive for the move was pure or that the child would benefit from the move did little to lessen the loss.

Relocation cases are fact intensive. All relevant facts must be presented in a clear manner. Prepare your case carefully using all available resources, including demonstrative evidence. Despite the existence of statutes and case law, no bright-line rules allow either party to predict with any certainty the end result. With thorough preparation, you can present a viable, persuasive move-away plan for your client.

Jacqueline M. Valdespino practices family law in Miami, Florida, and is a member of the Family Advocate Editorial Board.

"Making the "Must Move" Case at Trial," by Jacqueline M. Valdespino 2006, *Family Advocate*, 28:4, p. 19.

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Why Do I Need an NFA Firearms Trust?

By David M. Goldman

No CLEO Signature Required

The ATF requires that all individuals obtain approval from their chief law enforcement officer (the CLEO) as part of the application process to obtain a Title II firearm from another individual or Class 3 dealer. Many CLEOs around the country are refusing sign or even acknowledge the ATF forms. There is no legal remedy in most states to force the review of these forms. If using an NFA firearms trust to purchase a weapon, Form 4 does not require the CLEO's signature.

No Fingerprints or Photographs Are Required

When using an NFA firearms trust to acquire Title II firearms, no fingerprints or photographs are required. This is a cost savings and can also significantly decrease the time required to take possession of the items. Often fingerprints have to be retaken because they are not acceptable for the FBI's criminal database.

• Past Issues

Privacy

Individuals who submit their ATF forms to their CLEO are often concerned about who will have knowledge of their firearms. They also express concerns that they will come under additional scrutiny because the police will have knowledge that they are in possession of these more restricted firearms. With an NFA firearms trust, neither the CLEO nor the police are given notice that you will be in possession of or own the NFA firearms.

Incapacity

If you become incapacitated your family or friends are the ones who step forward to help you. In doing so, they may come in contact with the restricted items and put themselves at risk of violating the NFA without knowledge. An NFA firearms trust help protect these individuals from violating the NFA by providing them clear instructions on what they are and are not permitted to do.

Death

When you die your individually owned firearms will be part of your "probate estate." Probate proceedings will be necessary to transfer your guns under your will or to your heirs and are part of the public record. Because a family member or a friend usually handles probate proceedings, it is important not to unknowingly place them at risk of violating the NFA. With an NFA firearms trust, your firearms are not subject to probate or public record. Your beneficiaries will be protected because they will receive guidance on how and under what circumstances the items can be legally transferred to others. If you have children, an NFA firearms trust has specific provisions to protect them and make sure they do not receive the property if they live in a location where it is illegal to possess NFA firearms, and most importantly they are mature and responsible enough that you would want them to have the firearms.

Co-Owners and Authorized Users

If an individual purchases Title II firearms then he or she is the only one permitted to use or have access the firearms. Many people incorrectly believe that it is ok to let others use their NFA firearms when in their presence. However, the NFA would consider this a transfer and be a violation of the law. When your spouse or someone else knows the combination to your firearms safe, you may be violating the restriction on letting others access or possess your firearms. Improper possession through constructive possession is a form of unauthorized possession, and a violation of the NFA. If you use an NFA firearms trust to purchase Title II firearms, you can designate additional owners and authorized users. You can eliminate the risk associated with an improper constructive possession with a simple signature authorizing that person to be in

legal possession of the items. This can help protect you and your family from the penalties of violating the NFA.

Reducing Risk of Legal Changes

Many groups are attempting to limit the ability to transfer firearms to their family or friends. With an NFA firearms trust an adult child, family member, or friend can be made a co-owner of the trust. While the ownership of the NFA firearms trust can be changed, the NFA firearms trust is still the registered owner of the firearms and no transfer has taken place under the NFA.

Penalties for Violating the National Firearms Act can be Severe.

Each violation of the National firearms act subjects the owner to forfeiture of all weapons, 10 years in prison, and fines of up to $250,000. An NFA firearms trust provides guidance to the creators, managers, and beneficiaries of the trust to help them avoid violating the NFA.

Benefits of a NFA Firearms Trust Over a Corporation or LLC

Corporations and LLCs have annual fees associated with them. Business entities are not private and much information about the individuals associated with them is contained in public records. Corporations and LLCs have annual state fees and other costs associated with the maintaince of the entity. Often business entities are subject to the requirement to file sales tax and income tax returns. If you already have a business entity that is used to purchase NFA firearms, the business is at risk if the managers or anyone else ever misuse a firearm. Each manager of a corporation of LLC can purchase firearms and subject the entity to the penalties for violating the NFA. To make a change to the people authorized to use, purchase, or possess the firearms, the secretary of state needs to be updated with the changes in the management of the company. This can cost money and take a substantial time to complete. In addition, business entities do not deal with incapacity or death like an NFA firearms trust does. Unlike with a corporation or LLC, an NFA firearms trust does not require any annual recording fees and documents do not need to be filed with the state. To make a change to an NFA firearms trust, one simply amends the trust to change who can use, purchase, or possess the firearms without risk of criminal liability for violating the NFA.

Benefits of a NFA Firearms Trust over a Revocable Trust

There are more than 50 differences between a traditional trusts and an NFA firearms trust. Only a few of the issues will be discussed here. Most trusts do not instruct how to purchase, who may use, or who may have access to Title II firearms. They also do not give the people involved with the trust enough

information to properly sell or transfer assets. If you become incapacitated, it may be necessary to sell some assets. When you die, these restricted firearms need to be transferred properly. An NFA Firearms trust provides information to determine if:

1. it is permissible to transfer the items;
2. the items are legal in the state where they will be transferred to;
3. the beneficiary is legally able to be in possession of or use the firearms; and most importantly
4. the successor trustee is given the ability to determine in their own mind, if the beneficiary is mature and responsible enough to receive the firearms.

A normal trust allows the trust to be revoked even if it's assets become illegal upon revocation. Also a normal trust allows a trustee to resign while they are still in possession of restricted firearms. A trustee may also find that with a normal trust, an agent acting under a power of attorney may take actions that are in violation of the NFA and subject them to criminal penalties.

Most people using traditional trusts purchase NFA firearms incorrectly. They usually purchase them as an individual and then transfer the weapons into the trust. Although the ATF may approve a transfer from the dealer to the trust, they never approved an individual transfer from the dealer nor a transfer from the individual to the trust.

Invalid Trusts

Many free trusts on the Internet or from other sources have been found to be invalid. Lately we have seen many dealers and manufactures providing trusts to customers or helping them to fill out the trusts in order to purchase firearms. The problem with using an invalid trust or one not signed correctly or at trust that is not complete is that the trust does not exist. If the trust does not exist, even if the ATF approves a transfer to the trust, you will be illegally in possession of the firearm and subject to the penalties of the NFA. Even valid trust have substantial problems with dealing with incapacity, death, and transfer of the firearms as they instruct the trustees to take steps that create liability to the beneficiary put the assets at risk of seizure, and put both the trustee's and beneficiary at risk of the penalties for violating the NFA.

Bio

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ESTATE PLANNING

The Disposition of Digital Assets: Estate Planning Potential *Not* Just Propaganda

By Karin Prangley

There has been a small flurry of attention in the media recently addressing the disposition at death of so-called "digital assets" (i.e., email accounts, social networking profiles, web pages, blogs and domain names). Despite this clamor, most estate planners still do not address the disposition of a client's digital assets in the estate planning process. Wrong move.

Many estate planning attorneys would be surprised to learn the value (both emotional and monetary) of certain "digital assets" such as email accounts, websites, social networking profiles, online store credits, and other digital media.

For example, when a family member who operated a small business suffered a stroke earlier this year, I learned first-hand how valuable his email account was to his business. He maintained contact with his customers and suppliers solely through email, and when his family and business partners could not access his email account during his disability, a significant amount of business was lost.

• Past Issues

The sophisticated business succession plan that his estate planning attorney had created did not help to resolve that problem.

When we contacted the internet service provider, we still did not get the information we needed. Many internet service providers (such as Yahoo) will refuse to share an individual's password absent a court order. This policy is understandable in light of the stringent privacy laws imposed on such companies. Other internet service providers such as Gmail (Google) require a copy of a death certificate prior to turning over a decedent's email password. But even these less stringent procedures can lead to an unnecessary and costly delay.

As more and more people move the important components of their lives onto the computer, it becomes necessary to devise a safe and secure method for a person's loved ones to access digital information in the event of death or disability. This we know, we've heard it all before. Despite these warnings, it appears that most estate planners are doing little or nothing to address the disposition of digital assets with their clients. Perhaps because estate planners don't believe there is yet a fail-safe solution to this problem. I've heard several concerns discussed by estate planners. Easy solutions like giving passwords and other digital information to a trusted individual have their obvious shortcomings —the information could be (even accidentally) misappropriated or misplaced. I have heard several estate planners express reluctance to hold the client's passwords themselves, believing that doing so could expose the estate planning attorney to undeserved blame in the event that information is stolen or misappropriated by a third party. It also appears that many estate planners shun the use of paid service providers such as legacylocker.com and assetlock.net (formerly known as youdeparted.com) that store passwords and other digital information online for a small fee, perhaps because they are not yet confident that these sites appropriately safeguard the information.

Although there may be no perfect solution to this problem, for many individuals, especially those that are technologically oriented, doing nothing is the least perfect solution of all. The true monetary cost of doing nothing may only be that a few thousand dollars of online store credits, pay pal monies and similar value is lost forever. However, the much greater cost may be that many of the decedent's precious memories (e.g., photos, email messages and social networking profiles) are inaccessible to those left behind. Even worse, as my family recently discovered, the cost of failing to address a client's digital assets may be devastating for a small or family owned business.

There may be no way to know if your client is a "techie" unless you address the

topic directly with the client. If it becomes clear that the client prefers to keep all his or her important information off-line and insists that he has no digital assets of value, then the conversation can end there. However, if many of the important elements of the client's financial and personal life reside online, then the client deserves some guidance. Perhaps the client is married and would feel comfortable creating a list of his passwords for his spouse. Even better, the client and the attorney may find (as I have) that some websites that store passwords and other digital information have state-of-the-art security and can effectively make relevant information quickly and readily accessible to trusted persons in the event of death or disability.

Just as the estate planner would not hesitate to address a complicated generation-skipping transfer tax problem staring him in the face (and may be liable for malpractice for failing to do so), he should also not hesitate to find an appropriate method for the client to dispose of his valuable digital assets at the time of this death. After all, many everyday estate planning techniques such as GRATs and sales to grantor trusts have inherent risks and are not perfect solutions to the tax problems faced by clients. But estate planners nonetheless readily employ these techniques to assist their clients. I am not suggesting that estate planners recommend that clients post their passwords on a billboard or engage in any other unnecessarily risky technique. However, many viable options are available for disposing of digital information in the event of death or disability that do not place the client in an inordinate amount of danger.

As with many problems created by advances in technology, further technological developments may come along to provide a perfect solution to this problem. While we wait for these developments, the best solution for now may be to have an open and honest discussion with your client about the solutions available, rather than remaining silent on the issue, and to encourage the client to select the most appropriate method for storing digital information.

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"The Disposition of Digital Assets: Estate Planning Potential Not Just Propaganda," by Karin Prangley, 2009, *RPTE eReport*, available at http://www.abanet.org/rpte/publications/ereport/2009/5/TE_Prangley.pdf.

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PRACTICE MANAGEMENT

Tough Clients, Tough Issues

By Todd C. Scott

Law school doesn't usually prepare a lawyer for dealing with an overly-angry client or someone who always goes into hiding when you want to ask them why they haven't paid their bill. But how you handle yourself during certain, crucial client interactions can make the difference between a successful client matter and a possible malpractice claim.

Tough clients come in all forms. Some don't realize the problems they create for their lawyer and their troubles stem from a lack of understanding of how the legal process works. Simply put, they are well meaning but they don't understand how you, their lawyer, need to do your job. Others are a disaster waiting to happen, and a good lawyer will recognize at the outset that there's a strong likelihood that the client will be trouble to work for.

• Past Issues

Identifying the obstacles to successful client advocacy and declining an offer to represent those who display the characteristics of a troubling client is the goal for avoiding tough issues with your clients. Declining representation is not always easy, especially for newer lawyers establishing their law practice or a lawyer whose practice is challenged by tough economic times. But experienced lawyers usually recognize that the cost of declining representation is an affordable price to pay after considering the expense of wasted time for which the lawyer will never get paid. Or worse, after incurring the expense of a malpractice claim asserted by a client that your gut told you from the start could never be made happy.

A wise lawyer once said that no lawyer ever looked back on the day of their retirement and wished they hadn't fired that one client who looked like they would be trouble. Unfortunately, the reverse is often true. Ignoring your gut instinct and taking on an offer to represent a client who displayed all the signs of trouble is a regret that too many lawyers know all too well.

Making a Proper Withdrawal

It may not be too late to terminate representation of a matter for a client who is fast creating the conditions for an unsuccessful outcome. But withdrawing from representation needs to be done correctly or your client problems could go from bad to worse.

A lawyer's obligations to a client upon withdrawal are primarily governed by local and state court rules. Court rules vary depending on the jurisdiction, but there are some common requirements that you can expect to see when investigating what's required for an attorney withdrawing from representation. For example, almost always the courts will require that in order to be effective, an attorney who has already appeared in a legal proceeding and is withdrawing from the matter must serve a notice of withdrawal to all parties and the court administrator. Typically, the notice of withdrawal will include the address and phone number where your client can be served or notified of matters relating to the action.

In most instances, once an appearance has been made on behalf of a client, you should assume that you must have approval of the court in order to withdraw. The court, when considering whether the lawyer has stated reasonable grounds for withdrawing from representation, doesn't always consider the client's failure to pay your fee as a reasonable excuse for terminating representation. Courts will want to look at the terms of payment and whether the lawyer gave the client sufficient warning that the lawyer would withdraw from representation unless

their obligation to make payment has been fulfilled.

ABA Model Rule 1.16 Declining or Terminating Representation also defines several instances where withdrawing from representation may be permissible. Good cause for withdrawal exists when:

- Withdrawal can be accomplished without adverse effect on the interests of the client;
- The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- The client has used the lawyer's services to perpetrate a crime or fraud;
- The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.

The professional rules of ethics also define certain circumstances where terminating client representation is not just an option, but it is mandatory to do so. ABA Model Rule 1.16 Declining or Terminating Representation states that a lawyer must withdraw from representation if the lawyer has been discharged by the client, the representation will violate the rules of professional conduct or other law, or the lawyer is impaired in such a way that the representation will be affected.

In no case does attorney withdrawal create an automatic right for a continuance or any other rights for your client. The pace of litigation will not slow down because you are off the case so you need to make sure your actions do not prejudice the client’s standing with the trial courts and that there is reasonable time for substitute counsel to transition the matter.

To further emphasize this point, ABA Model Rule 1.16(d) states that the lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.

Tough, Tougher, Toughest

If a client never returns your phone calls, or stops in the office without calling ahead for a daily personal update, sometimes a direct and honest conversation with the client about their problem behaviors is all it takes to get the matter back on track and free from distractions. You should be prepared at all times to discuss issues head-on with clients. Clients who are never told that the firm expects to be paid within 30 days from the date of invoice will often assume you have a lax payment policy and are usually more than happy to take advantage of the situation.

Other client matters may not be so quick to resolve, and some may be doomed from the start. The following list is a sampling of the tough issues attorneys routinely encounter with troubling clients, and some practical advice for dealing with the problems they create.

The Super-Saver Client

The Super-Saver client wants to handle many of the tasks and chores related to their legal representation in order to save costs and fees. To these clients, the lawyer–client relationship as one where the lawyer can work closely with the client, dividing the tasks related to investigation and negotiation in order to save some of the lawyer's time, and consequently, some of the costs their legal services. To the lawyers faced with these client requests, they usually see these kind of lawyer–client relationships as nothing but trouble. Problems can arise quickly in these matters where the client wants to do some of the work, usually when the lawyer and the client fail to perform a critical task because they each assume the other has it under control. There are times that it is appropriate for a client to take on certain tasks related to their legal matter. The key to keeping the matter on track is that it should be the lawyer—not the client—that identifies which, if any, of the tasks related to the matter should be assigned to the client. Additionally, the lawyer should oversee the client's progress just as they would if they were working with their own nonlawyer staff.

The Friends and Family Client

Sometimes trouble comes in nice packages. It may not seem like it at first, but representing a friend or family member is frequently the cause for lawyer anxiety and regret. How could the people that care about you the most be the one of the biggest sources for a headache and a potential malpractice claim? The answer is that quite often a lawyer representing a friend or a family member throws out all their usual rules for controlling a client matter and keeping it on track when a friend or family member is asking for legal help. A friend or a family member that has a very high level of trust in you will seek you out for legal assistance, without regard for your area of practice or specialty. Lawyers

should resist the urge to dabble in unfamiliar practice areas, or even worse, unfamiliar jurisdictions, because someone close to them needs help. If you are called upon for legal help, be mindful of the systems and methods you have developed to help keep your legal matters on track. Ask that the individual meet you in your office and establish a client file and, calendar all important deadlines for the matter, just as you would for any other client.

The "You'd Better Fix it" Client

It's a rare thing when a lawyer can continue to represent a client after making a mistake on that client's matter. Although your instinct may be to continue with the matter to fix the problem you may have created, the continued handling of the matter creates a conflict of interest with your client that is likely unwaivable. Once a critical mistake is made on a client's matter, the lawyer's independent professional judgment is invaded by thoughts that may run contrary to the client's best interest and toward the lawyer's own—such as taking the next settlement offer that comes in. Depending on what kind of mistake you made, your error could be the type which unwittingly makes you a party to the matter. In that case, most states have professional rules modeled after ABA Model Rule 3.7 Lawyer as Witness that preclude a lawyer from acting as an advocate in a matter where the lawyer reasonably knows they may be called as a witness. If you are unsure whether you can continue representing a client in a particular matter because of an error that you may have made, the best thing to do is to contact a claims representative from your professional liability carrier for advice on continued representation. A conversation about continued representation is in order to make sure the client's matter is on track and safely handled by their legal representative—whomever that may be.

The Always and Forever Client

Even the most sophisticated clients will sometimes presume that you are their lawyer for all their legal matters—past, present, and future—even though you may have been retained to handle only a single matter. Clients often appreciate having an open-ended relationship with their lawyer, giving them the ability to stop in the lawyer's office and discuss just about any matter that gives them concern. Problems arise when the lawyer, who is focused on the matter for which they've been retained, don't realize that from the client's perception, they have been keeping you informed about other matters for which they assume you are looking out for their best interests. Things get more complicated when you are handling multiple matters for the client, some of them ongoing. The key to avoiding these difficult misunderstandings is to separate out each representation with an engagement letter and ending each representation with a closing or

termination letter. If a client engages you regarding other matters, clarify that you are not equipped to provide adequate advice on matters you have not been retained to handle, and if necessary, follow up with a note or letter to the client clarifying that you do not represent them in the other matter.

The Missing Client

Nothing can be more frustrating for an attorney than when you find yourself prepared to represent a client—but finding the client is not nearly so easy. A common problem for busy lawyers is locating a client who has moved their residence but didn't think to tell you about their change of address. What's worse is when you are unable to find a prospective client to inform them that you do not plan on handling their case, after they left you with their personal legal documents. A little preliminary work at the first client meeting can go a long way to prevent these troubling situations. At the outset, stress to the client the need for them to stay in regular contact with you so that critical decisions can be made in a timely manner. Ask that the client not only provide you with a current phone number, email, and address, but also the same contact information for a close family member that will presumably, always know how to contact the client. If you are unable to gain contact with a client and a critical deadline is approaching, sending the client a registered letter through U.S. Postal Service with return receipt requested is a good method of locating a client since many individuals forward their mail, and the return receipt is evidence you've taken reasonable steps to locate the missing client.

The Remorseful Client

A client who is experiencing difficult problems in their life may be anxious to resolve their legal matters quickly. In their desire to get the matter over with and "get on with their life," they may push for a quick settlement without regard to the long-term consequences of their decision, and completely ignoring your better advice. Trouble comes when the client's life is finally back in order, and they begin to look again at their legal matter and have remorse for the decisions they may have made. For clients anxious to get their legal matter over with, it is more important than ever to accurately document the client file to include information that you have given the client advice and the client has chosen to disregard it. In these circumstances, is probably necessary to follow up the advice with a letter to the client, or some other documentation memorializing the conversation and your client's decision to pass up your recommendation. If the client's disregard for your advice can only lead to negative possible outcomes you may want to consider withdrawing from the case for some of the reasons stated above in ABA Model Rule 1.16(d).

The Client Who Won't Pay

Many lawyer-client disagreements start with the client's unwillingness to pay the lawyer's fee in a timely way. Suing a client for payment of fees frequently makes the problem worse as many clients respond with a counter-claim for malpractice. The best way to handle a matter involving a client who won't pay your fee is to address the client head on. Contact the client and ask them if there is a problem with your fee or the legal services you have provided to them. Often a client who won't pay a bill has failed to do so because it slipped their mind, or they are having trouble coming up with the resources that are owed for your services. Either way, a quick conversation with the client on the matter can clear up a lot of misunderstanding. It is important for lawyers who are owed a lot of money to ask themselves, why did they ever let the bill get so high? Delinquent payments that are dealt with immediately can train the client early on that they are expected to pay your invoice just like any other bill or you will simply be unable to continue to represent them.

The Sneaky Client

Desperate people will do desperate things. Even so, it is often a great surprise when your client who is wrapped up in a difficult and painful legal case reveals to you that they have taken matters into their own hands and have broken the law in order to get a leg up on the opposing party. With the rapid development of personal technology, more and more lawyers are reporting that their clients have taken questionable steps, such as recording telephone conversations, reading other people's email, and hacking into an opponent's computer, in order to gain a competitive advantage in their case. If the client's activities are clearly illegal then you have no choice but to withdraw from representing the client for the reasons stated in ABA Model Rule 1.16(d) Declining or Terminating Representation. Even if it is not so clear that the activities were illegal, such questionable conduct can so severely taint the client's reputation in the eyes of a judge—and possibly yours—that prudence dictates you should inform the client that their activities has caused you to withdraw from representing them on their case.

The Angry Client

No matter how far along you are in your legal career, and despite the high quality of work and service you deliver day-to-day, at some point you are likely to run into a very angry client. Legal matters have often brought out the worst in some individuals, but more frequently, lawyers are reporting significant security concerns as very angry clients see their lawyer as the sole person making their life difficult. The level and severity of the client's anger may come without

warning, but it is important for your safety and the safety of the others you work with to handle the matter calmly and with some compassion for the client. If such an episode of anger occurs in your office, try to meet with the client in a conference room or a common area so others may be aware of what's going on. Also try to listen to what the client is saying and validate their points in order to diffuse the high level of tension. Do not attempt to give the client advice or get into details about their matter—the goal is to diffuse the situation and take an extended break from the discussion until the client has had some time to calm down. It is also important to train your staff to recognize these situations when they are happening and to know how to call someone for help, such as another colleague, a security guard, or the police. Your staff should be trained to understand that these situations will likely occur and therefore, they need to be ready to help bring the situation to a peaceful ending.

Todd C. Scott is vice president of member services at Minnesota Lawyers Mutual Insurance Company and frequently writes and lectures on practice management, professional responsibility, and legal technology topics. His blogs can be found at www.attorneysatrisk.com and he can be reached at tscott@mlmins.com, or @RUatRISK on Twitter.

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PRACTICE MANAGEMENT

Developing Your Law Firm's Culture: A Key to Success in Today's Legal Market

By Kevin Chern

In the spring edition of *Law Trends & News*, attorney Savina P. Playter wrote an article titled "Changing Gears in Economic Downturn" about the rapid changes faced by the legal industry during recent economic trends. In her article, she gave very good tips on training, marketing, organization, mentoring and reconnecting with former friends, family and colleagues. Playter commented, "As the face of the economy changes, those changes are reflected in each sector and industry. The legal industry is not exempt from these rapid changes, and as lawyers face an uncertain future, they must create a shifting paradigm to manage their stress and legal costs."

This month, I would like to spin off of those comments to discuss another key

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component in building a promising future and a successful business model for your law firm: culture. With recent economic, social and technological changes it is clear that the business world, legal profession and employees are changing, too. If you want to recruit and maintain the most talented, effective staff and attorneys for your law firm and provide top-notch client service, culture is something you have to think about when developing your law firm as a business and a service.

How Do We Define "Culture" in a Law Firm?

Often, when we market law firms to consumers, we define ourselves by talent. While talent is an important aspect of any law firm, the right kind of culture can be just as important. "Talent" is largely self-explanatory, but many attorneys and law firm administrators are not quite so clear when it comes to "culture." When we talk about "talent" we refer to simple and often measurable concepts such as knowledge, experience or professional recognition.

So, when attorneys, talk about "culture," what exactly does that mean? Basically, "culture" is a set of shared attitudes, behaviors, values, goals, practices and attributes that characterize an institution, organization or group. In other words, these characteristics are the traits and mindsets that are shared by individual employees and staff members who make up your law firm, in addition to the types of clientele you attract.

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 firm goals, desired clientele and employee satisfaction. The solo practitioner or law firm partner who does not think about culture, however, is missing an important opportunity, if not a necessary component of creating a successful law firm in today's legal industry.

Culture will develop, with or without conscious guidance, and the culture that grows up accidentally may not be the one you would like to foster, nor the one that helps your law firm achieve its goals. In part, that is 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, internationally recognized layer and author of the best seller *The Successful Lawyer: Powerful Strategies for Transforming Your Practice*, talked about this disconnect at the Get a Life Conference in 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 are not aware of the way that their own personalities and methods of interacting steer the culture of the firm as a whole.

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

Building a law 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, as well as the disconnection, 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 do not 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 are 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 it 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 attorneys and other law firm team members take ownership of the goals and priorities of your law firm?* While a strong leader may be setting the overall goals and priorities of your law firm, it is important that your team embraces these goals wholeheartedly. Make sure that everyone in your law firm is on board with goals and priorities by establishing a sense of ownership. Lower level attorneys and staff members should understand that reaching cultural goals and priorities will be a win for everyone, not just partners. Help employees embrace your law firm culture by listening to their individual aspirations and crafting their roles within the law firm and incentives that will position people to flourish both as employees and unique

individuals. By encouraging ownership in the planning process of your law firm's culture, you can replace cynicism and mediocrity with zeal and tenacity. This will help build relationships among staff members, while also attracting clients to the energetic, positive vibe reflected by your law firm.

- *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 is not 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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PRACTICE MANAGEMENT

Considering Life Insurance: A Financial Security Basic

By Reneé Leskiw

As a solo or small firm lawyer, your days are busy. Probably the last thing on your mind is drafting a will or a living will. However, death can play a major role in a topic you probably think about every day—your financial security.

Although it is an uncomfortable topic to consider, to ensure you're on solid financial ground, you should consider what would happen to the people you love if you are gone. If family members depend on your income, you probably want to ensure they are well taken care of in the event of your death. If nothing else, you'll want to have arrangements for your end-of-life expenses including funeral and burial fees. If you have any debt, including a mortgage, in the event of your death, that debt is transferred to your estate. If you have a spouse who is jointly liable on one or more debts, he or she will become solely responsible. Can he or

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she pay that mortgage alone?

An easy and inexpensive way to ensure that these final expenses are accounted for and your dependents are financially secure is to purchase adequate life insurance. Money from your life insurance can be used to settle debt and to provide financial security for those dependent on you.

Even if your employer offers some life insurance coverage, you want to be sure that your life insurance portfolio protects all of your financial obligations. Employer-provided coverage can be only one to two times your annual gross income. However, the financial need can be 5, 10, or 20 times your annual gross income.

As you evaluate your financial plan, you may find that the life insurance you already have in place is not enough and want to consider supplementing that coverage.

There are many types of insurance products to consider. Choosing which option is right for you will depend on what obligations you are trying to provide for, how long you need that coverage and how much you are willing to pay for the insurance.

Term life insurance is perhaps the most basic and least expensive form of life insurance. Term life provides protection for a specific period of time, so it can cover the same period of time as your mortgage, while children are in the home, or when children will be in college. “Level term” life offers premiums that are locked in for the period that coverage is in effect. Level term life is usually available for 10, 15, 20 or 30 years.

Permanent life insurance offers life-long protection but with higher premium rates than term life insurance. Permanent life insurance may have the option of earning dividends, although not guaranteed, that can be applied toward the premium.

Whole life insurance offers protection throughout your entire life as long as premiums are paid. This insurance includes death and living benefits by allowing loans or withdrawals against the value of the policy while still living. Any withdrawals or loans will be counted against the death benefit. Premiums remain level throughout the life of the policy, with rates usually much higher than term insurance.

Universal life insurance provides permanent life insurance protection that pays

the benefit amount if death occurs before the maturity date or pays the cash value (which accumulates through premiums paid over the life of the policy) if the insured is living at the maturity date. Insurance costs increase each year based on age.

Whatever choice you make regarding the type of life insurance, now is the time to consider applying. For the application process, no matter the specific product, you will likely be required to provide your health history. If you apply now, when you're younger and probably most healthy, you may receive lower premium rates throughout the life of the policy.

Reneé Leskiw is the executive director of the American Bar Endowment (ABE).

Established by the American Bar Association in 1942, the ABE is a §501(c)(3) not-for-profit organization which makes grants to support the good works of the legal profession. Among other activities, the ABE sponsors insurance programs for all ABA members that provide a unique opportunity to get quality, affordable insurance from trusted insurers, while supporting legal research, education and public service through donation of dividends. The ABE sponsors Group 10- and 20-year Level Term Life Insurance plans at affordable rates exclusively to ABA members. Learn more at http://www.abendowment.org/lt.asp.