GP|Solo Law Trends & News
Practice Area Newsletter

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

February 2006 **Volume 2, Number 2**

In this issue...

Dear Division Member:

Below is the winter issue of Law Trends. As with prior issues, this e-newsletter includes articles, checklists, and other valuable practice information and practical tips, all from each of our substantive practice areas in the Division. This issue also includes some new areas, being articles written by law students and also some articles on ethics issues. This issue also includes articles some in-depth analysis of the new bankruptcy law revisions, checklists for easement matters and many more. Thus, I am delighted to attach your Winter Edition of Law Trends .

We hope this publication continues to be helpful to you in your daily practice. I encourage you to take just a few moments to read the list of articles included. Of course, it is yours to download and keep as a reference for the future. And, as in the past, you can either download specific articles or you may download the entire newsletter by clicking the pdf link located below .

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

I hope each of you enjoy this issue of Law Trends. The publication will continue quarterly this year and we hope will continue to be a continuing source of valuable information for you . If you are interested in either writing an article for the fall issue or participating in the production of the newsletter or are interested in getting involved in any way, please contact Jim Schwartz, Law Trend's editor, at attyjls@aol.com. Jim can direct you to the proper editor if you would like to submit an article to be considered for publication in one of these newsletters or help you get involved in publishing it. I know that Jim is always seeking new writers and is willing to work with volunteers in submitting articles and working on the newsletter. Also, if you have any questions, comments or suggestions about this issue or other things you would like to see in the future, please contact Jim or me.

I hope to see you at the Mid-Year meeting in Chicago later this week. Otherwise, I'll look forward to seeing you at the Division's Spring meeting in Kansas City.

Best regards,

Dwight L. Smith , Chair

Business Law

[Are Attorneys "Debt Relief Agencies" under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005?]

[Managing Adversity in Business]

[How to Take Control of Your Practice by Creating Vision and Mission Statements]

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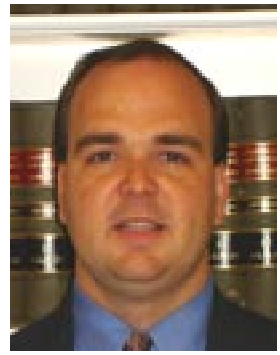
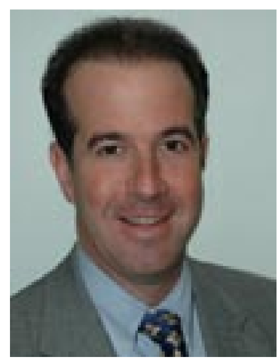


Profile: Scott Laufenberg, Business Law Group Coordinator

Scott received his undergraduate degree from the University of Wisconsin – Platteville, and he received his J.D. and a master's degree in public administration from Drake University. After clerking for the Kentucky Court of Appeals upon graduation, he currently practices with the firm of Kerrick, Stivers & Coyle, P.L.C. in Bowling Green, KY. He is also an adjunct professor at Western Kentucky University where he teaches an upper-level course on legal principles to students pursuing degrees in business-related majors.

Estate Planning

Profile: David Lefton, Estate & Financial Planning Group Coordinator



David H. Lefton is a founding member of Hardin, Lefton, Lazarus & Marks, LLC. He is licensed to practice law in the state of Ohio and concentrates his practice on estate planning and probate.

Mr. Lefton is actively involved in the American Bar Association (ABA) and the Ohio State Bar Association (OSBA). In addition to serving as group coordinator for the Estate and Financial Planning Group, Mr. Lefton is also involved with the Solo Day Annual Meeting and the Financial Management Committee.

In Ohio, Mr. Lefton is the current chair of the Solo, Small Firm and General Practice Section of the OSBA. On this Board, he has served as chair of continuing legal education programs sponsored by the Board, has planned educational programs for the continuing education of lawyers in Ohio and has chaired the Ohio Economic and Technology Survey of attorneys throughout the state.

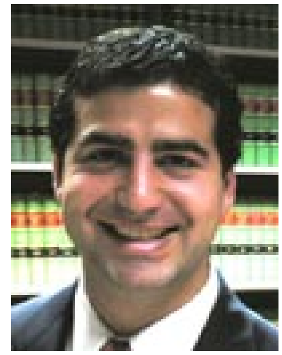
Mr. Lefton is also one of his county representatives on the Estate Planning, Trust and Probate Board of Governors for the OSBA. This Board reviews and proposes legislation on topics that effect estate planning and probate in the state of Ohio.

Mr. Lefton has also served as a speaker at numerous CLE seminars on the subject of estate planning and probate. In conjunction with the seminars, he has prepared reference materials for attorneys to use and refer to in their law practice.

Family Law

Litigation

Profile: Jonothan Wolfe, Litigation Law Group Newsletter Editor



Mr. Wolfe, who joined the Skoloff & Wolfe litigation department in 2003, handles a wide variety of complex litigation for individuals, partnerships and corporate clients in state and federal court. Prior to joining Skoloff & Wolfe, Mr. Wolfe was a member of the litigation department at Milbank, Tweed, Hadley & McCloy in New York City. Mr. Wolfe is a member of the ABA House of Delegates, Chairs the Family Law Committee for GP Solo, and holds numerous other positions in the ABA and the New Jersey State Bar Association.

Mr. Wolfe received his J.D. from New York University School of Law and graduated from Cornell University with honors. Mr. Wolfe is admitted to the Bars of the State of New Jersey, New York, the United States District Courts for the District of New Jersey and the Southern District of New York, the Second Circuit Court of Appeals, and the United States Tax Court.

Real Estate

15 Things to Remember in Drafting Real Property Easements
An Easement Checklist

Need House Work?
Tips on Choosing the Right Contractor

Law Student Corner

The Top Five Reasons to Clerk for the Department of Justice, United States Attorney's Office

The Best Things About Clerking for a Solo Practitioner or Small Firm

Yes Virginia, Law Can be Learned On-Line

Alan Fowler is the Law Student Division Liaison to GP|Solo. Alan is a third-year student at Mercer University School of Law. He was recently commissioned as an Ensign in the Navy, where he will serve as a JAG Officer following graduation.

Ethics

Conflict-Checking Systems:
Three Great (and Cheap) Ways to Effectively Manage Conflict Checking

Planning For Disaster –Ethically

Download the entire issue in PDF (495 KB, 111 pages)

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Business Law

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Are Attorneys "Debt Relief Agencies" under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005?

By Catherine E. Lasky

Have you or any member of your firm appeared in a Chapter 7 or Chapter 11 bankruptcy proceeding on behalf of a consumer?

Do you include the following language on your firm website or advertisements? "We are a debt relief agency. We help people file for relief under the Bankruptcy Code."

Probably not. But attorneys practicing bankruptcy law may in fact be required to identify themselves as debt relief agencies according to the newly-enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("the BAPCPA"). One of the new and significant aspects of the BAPCPA are the provisions designed to restrict and monitor the activities of so-called "debt relief agencies." Among other requirements, Section 528(a)(4) mandates that a "debt relief agency shall… clearly and conspicuously use the following statement in such advertisement: 'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement." *See generally* Sections 526, 527 and 528 for the restrictions on and requirements for debt relief agencies. However, who and what is a debt relief agency, and more specifically, whether attorneys are debt relief agencies, remains a matter of great debate, dispute and confusion.

Section 101(12)(A) defines a debt relief agency as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110…". The definition of debt relief agency does by its terms encompass both non-attorneys and attorneys and specifically all attorneys who represent consumer debtors. *See* Section 101(3) for the definition of “assisted person” and Section 110(a)(1) for the definition of “bankruptcy petition preparer.” Section 526(c) outlines the penalties for violations of the debt relief agency provisions ranging from voiding of contracts between the debtor and debt relief agency or disgorgement of fees to *sua sponte* civil penalties or injunctions imposed by the Bankruptcy Court or prosecution by State authorities for injunctive relief or monetary damages against the offending party. The applicability of these provisions to attorneys was left unresolved by Congress and has left bankruptcy attorneys mired in a sea of uncertainty and with potentially great consequences.

In re Attorneys at Law and Debt Relief Agencies

Underscoring the importance of resolution of this issue, one bankruptcy court decided, on its own motion and on October 17, 2005, the effective date of the BAPCPA, “whether amendments to the Bankruptcy Code, which become effective today, regulating Debt Relief Agencies apply to attorneys licensed to practice law who are members of the Bar of this Court.” In re Attorneys at Law & Debt Relief Agencies, 332 B.R. 66, 67 (Bankr. S.D. Ga. 2005). Chief Judge Lamar W. Davis of the Bankruptcy Court for the Southern District of Georgia warned that if attorneys were encompassed within the definition of debt relief agencies, “a new layer of regulation will be superimposed on the bar of this Court . . . . That is a burden which should not be borne by the Bar needlessly or merely out of an abundance of caution.” Id.

Judge Davis began his analysis of the debt relief agency provisions with his interpretation of the language of the provisions at issue. He first examined the Section 101(4A)’s definition of “bankruptcy assistance” as that term is used in the definition of debt relief agency, which includes tasks and responsibilities performed by bankruptcy attorneys, including most obviously, “providing legal representation.” Judge Davis did not believe that language to be dispositive of Congress’ intent to include attorneys in the definition of debt relief agency. See id. at 69. He instead concluded “that the inclusion of the term ‘legal representation’ in the definition of ‘bankruptcy assistance’ was Congress’ effort to empower the Bankruptcy Courts presiding over a case with authority to protect consumers who are before the Court, who may have been harmed by a debt relief agency that may have engaged in the unauthorized practice of law, and whose existing remedies for any damage is more theoretical than real.” Id.

Judge Davis also examined the intent and purpose of the particular provisions regarding debt relief agencies including Section 527(b). The Court reasoned that if a debt relief agency is required to instruct consumers that they have the right to hire an attorney, that only an attorney can give legal advice, and that consumers are able to represent themselves pro se in bankruptcy proceedings, it follows that such requirements were not meant to apply to attorneys themselves. See id. at 70.

Judge Davis further relied on traditional ideas of preemption and held that because regulation of both the admission and discipline of attorneys is historically a matter of state law, any attempt by Congress to regulate attorneys through the debt relief agency provisions would have to be clear and explicit. Judge Davis found that the BAPCPA did not meet these requirements. Id.

While Judge Davis' analysis appears thorough and sound, not all bankruptcy court judges agree with his holding. For example, Judge William Houston Brown of the United States Bankruptcy Court for the Western District of Tennessee in collaboration with attorney Lawrence R. Ahern III recently published an analysis of the BAPCPA in which they opined that the definition of debt relief agencies does in fact include attorneys. See William Houston Brown & Lawrence R. Ahern, III, 2005 Bankruptcy Reform Legislation with Analysis (2005). Judge Brown and Mr. Ahern believe that "[a]ttorneys who provide bankruptcy assistance to . . . debtors fall within the definition of a 'debt relief agency' and will be subject to the restrictions and disclosure requirements placed upon those agencies by new Code §§ 526, 527 and 528." Id. at 58. Judge Brown recognized that these requirements present a quandary for those large number of bankruptcy attorneys who represent both debtors and creditors. By having to advertise as an attorney for a debtor, there is great potential for confusion among perspective creditor clients resulting in harm to bankruptcy practitioners' practices.

Similarly, an examination of the legislative history of the BAPCPA reveals a record of discussion regarding the difficulties the debt relief agency provisions would cause bankruptcy attorneys by both the House of Representatives and the Senate. However, because those provisions remained part of the BAPCPA as passed, this further undermines Judge Davis' analysis of Congress' intent and opens the door for other courts addressing this issue to reach a contrary conclusion. Senator Russell Feingold from Wisconsin proposed an amendment specifically addressing attorneys and the debt relief agency provisions, which "bankruptcy lawyers are very concerned about." 151 Cong. Rec. S2316 (daily ed. Apr. 22, 2005) (statement of Sen. Feingold). Senator Feingold's amendment proposed to insert the clause " other than an attorney or an employee of an attorney" in 11 U.S.C. § 101(12)(A), the definition of "debt relief agency." 151 Cong. Rec. S2180 (daily ed. Apr. 22, 2005).

According to Senator Feingold, his amendment was necessary because,

> [r]equiring lawyers to call themselves ‘debt relief agencies’ will do more to confuse the public than to protect it. I think members of the public generally understand what the word ‘lawyer’ means, but the phrase ‘debt relief agency’ is vague and unhelpful. It is also misleading, because there are significant differences between lawyers and nonlawyers, but both would be identifying themselves as debt relief agencies under this bill . . . .
>
> Furthermore, these provisions would apparently apply to any law firm that provides bankruptcy services, even if that law firm were primarily providing landlord-tenant advice- even to landlords- criminal defense services, or other unrelated services. Large firms with only one bankruptcy practitioner may be required to advertise themselves as "debt relief agencies."
>
> I think this will be immensely confusing to consumers without any apparent benefit.

151 Cong. Rec. S2316 (daily ed. Apr. 22, 2005)(statement of Sen. Feingold).

The American Bar Association and Federal Bar Association both strongly supported Senator Feingold’s amendment. The Federal Bar Association warned that the debt relief agency provisions would “drive many consumer bankruptcy practitioners out of this area of practice, depriving individuals of adequate legal representation and forcing them to seek less responsible alternatives such as unlicensed bankruptcy petition preparers or to file their petitions themselves.” 151 Cong. Rec. S2316 (daily ed. Apr. 22, 2005)(statement of Sen. Feingold). In essence, Senator Feingold and the Federal Bar Association warned that the debt relief agency provisions would result in less protection for consumers, the opposite result intended by the drafters and proponents of the BAPCPA . Senator Feingold’s amendment regarding attorneys and debt relief agencies was withdrawn before it could be voted on by the full Senate. 151 Cong. Rec. S2316 (daily ed. Apr. 22, 2005)(statement of Sen. Feingold). A similar amendment was proposed by North Carolina Representative J.C. Watt and rejected by the House of Representatives Judiciary Committee. See H.R. Rep. No. 109-31, pt. 1 (2005).

Conclusion

Judge Davis’ opinion has opened the much needed judicial dialogue regarding the applicability of the BAPCPA’s provisions regarding “debt relief agencies” to attorneys. While Judge Davis’ findings are certainly logical, justifiable and no doubt welcomed by bankruptcy attorneys, those conclusions may not be supported by the legislative history. It is certain that other courts will weigh in on this issue, but in light of the potential for serious penalties, including those that can be instituted by a bankruptcy court sua sponte, law firms outside of the Southern District of Georgia with even one attorney representing one consumer debtor must abide by the debt relief agency requirements and regulations.

Catherine E. Lasky is an associate with the firm on Phelps Dunbar LLP in the firm’s New Orleans , Louisiana , office. She practices in the area of commercial litigation

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Managing Adversity in Business

By Debra C. Scheufler

As attorneys, many of us are faced with adversarial situations on a daily basis. On behalf of our clients that is. But how do we manage adversity in the operation of our own practices? This is area in which I counsel clients quite regularly. Doctors, artists, electricians and even lawyers are typically very good at their trades, but are often not too effective at managing the business end of their businesses.

Whenever we interact with other people, the potential for adversity exists. Business owners may deal with customers/clients, vendors, employees, partners, and government agencies, and all of these interactions are breeding grounds for miscommunications and disagreements.

Clients may be dissatisfied with billing, strategy, or other aspects of legal representation. Vendors may miss-bill us or provide defective or unsatisfactory products or services. Partnerships can be like marriages; partners may disagree on the goals and direction of the practice or the responsibilities of each partner, or they may engage in wrongful acts in the course and scope of the business. Employees may also not perform as expected. Government agencies can cause a myriad of tax and compliance problems.

This article cannot solve all of those challenges. Rather, it provides some basic rules, preemptive suggestions, and solutions. Following are some basic rules, preemptive suggestions and solutions. The most important rule in dealing with a potential adversarial situation is “don’t wait, communicate.” Effective communication can cut many potential problems off at the pass. It is important to establish clear relationships from the beginning. Fee agreements and other contracts can help avoid many problems relating to what each party expects of the other. Regarding employees, basic rules and handbooks will let them know exactly what is expected of them.

The second rule is “communicate effectively.” If a relationship with any person or entity begins to get sticky, take the high road in your communications. Think about whether you want to be right or to attain your goal. Communicate in the preferred style of the recipient. If you know the other party likes to talk on the phone, call them. If their preferred communication modality is e-mail, use it. Begin and end every communication on a positive note. I start many letters with “thank you . . . .” Even if it is “thank you for speaking to me on the telephone . . . .” Saying thank you goes a long way. The listener or reader is much more likely to shut down and not hear a word you say if the communication starts with a threat or a criticism. If the communication ends that way, the reader may disregard everything they have read previously. You can do this without appearing to be a pushover and still maintain respect.

Effective communication does not arise from emotion. I often wait a day to open an e-mail or a letter that I know is not going to make me smile. After I receive problem letters and e-mail messages, I typically wait a day to respond to allow my emotional reactions to subside. If it is impossible to refrain from emotional involvement in an issue, it may be prudent to retain someone else to represent you in the matter. I have done so, as an example, in a tax audit.

Rule number three is “document, document, document.” Even if you deal with your potential adversary on the telephone, send a confirming letter or e-mail immediately to memorialize the conversation. Save hard copies of everything. Keep complete and organized files on all adversarial matters. You never know when you may need this documentation. Unfortunately this business is more about saving our assets than saving trees.

With these three simple rules:

- Don’t wait, communicate;
- Communicate effectively; and
- Document, document, document;

We can avoid many adversarial situations and minimize those that do arise.

With these three simple rules, we can avoid many adversarial situations and minimize those that do arise.

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How to Take Control of Your Practice by Creating Vision and Mission Statements

By Allison C. Shields

Many solos and lawyers responsible for managing their firms report feeling out of control or overwhelmed. Even successful lawyers will admit that their practices grew almost by chance, rather than by design. They don't have a handle on how their clients are coming to them, or what their clients are really looking for. They aren't sure how to grow their practice, to take it in a new direction, to get better work or better clients. They never sat down and thought about exactly what they wanted their practice to be, but they tell me their practice isn't what they want it to be.

There is hope. Stop to take stock of where you are and where you want your practice to be in the future. After all, if you don't know where you're going, how are you going to get there?

The first step toward creating the practice that you want is by establishing the vision and mission, writing them down, and sharing them with everyone that works in your firm so that they are inspired by them.

The vision and mission statements are the touchstone for everything you undertake, from strategic planning, marketing, management and practice building to recruitment, hiring and performance evaluations. These two statements are important, concrete guides for the future of your practice. Once the vision and mission are written and digested, the rest of your business activities, including the management and marketing of your practice, have a direction.

With a mission statement, you have a guiding principle against which to measure each of its actions. You can begin to craft your practice in a more purposeful way and create business plans which will bring the firm to its destination – the attainment of the firm's vision.

What is a 'vision?'

The vision is the statement of what you are building. It describes the idea of your firm in a way that captures your passion for your business and inspires you. It is the picture of what the firm wants to *be* in three to five years. Although some advocate creating a vision with a much longer time-frame, with the pace of business today and the changing legal landscape, creating a shorter term vision can keep you inspired and won't become obsolete before it is reached.

The vision should be specific and include items such as culture, the 'feel' and atmosphere of the firm, the intangibles that customers can expect, as well as the 'harder' or more tangible aspects of the business, such as number of clients, gross profits, number of employees, number of offices, number and types of practice areas, etc.

Crafting Your Vision Statement

The vision describes your dream for your practice. Set no limits when initially exploring the vision statement – let yourself describe your vision in an expanded manner. It may help you see possibilities you might not otherwise have recognized. Spend some time thinking about it before editing down to what you think is realistic or achievable. But remember when editing not to edit out your passion – that which makes you enthusiastic about reaching your vision.

Questions to Consider When Creating a Vision Statement

- Who is your ideal client?
- What are your financial goals for your practice?
- What will you or your firm be known for?
- What services will you provide your clients?
- What will your role be in the practice?
- Where do you practice?
- When will you need more space, different systems, more staff, more attorneys?
- Why are you practicing law?
- Why will your clients hire you rather than your competition?
- What will the culture of your practice be?
- What are your beliefs and values and how will they affect your practice?

What is a mission statement?

The mission statement describes the firm's current purpose, identifies the firm's market, values and priorities. It illustrates how the firm intends to achieve its vision and how it goes about the practice of law every day. It answers the question why clients will hire you to represent them.

Spending the time creating the mission statement and obtaining input from others in the firm enhances 'buy in' from the firm, regardless of its size, and establishes a starting point for the firm's forward progress.

Your mission statement will also be useful for your clients – it will convey to clients and potential clients the essence of your firm and the manner in which you do business. The mission statement can be a powerful tool, both for strengthening the infrastructure of your business, and for attracting and keeping the clients you want.

Crafting Your Mission Statement

The three keys to a mission statement are purpose, business and values.

Purpose

What is the firm's core purpose? Your response to this question should be a concrete one, and it is truly the foundation of your whole practice, and especially your management and marketing plans. Spend some time thinking about why your firm was created, what need it seeks to fill. Why are you practicing law? What do you hope to accomplish? What are you committed to providing to your clients?

The purpose section of the mission statement should also provide some information about the firm's basic management philosophy and 'in-house' style – does the firm want to be a small, boutique law firm, a large business, a family atmosphere, corporate atmosphere, etc.

Business

Your mission statement should also address the business of the firm – the firm's clients, practice areas and services provided. Keep in mind that if your firm has multiple practice areas, it might make sense to keep your overall firm mission statement more general and craft separate mission statements for the different practice areas.

Do you have or do you want to develop a niche practice? Who are the beneficiaries of your work? Who is your ideal client? What are their demographics? What are their problems or needs? What services do you provide to address those needs?

Values

The values expressed in your mission statement emphasize what you are aiming for, what the firm's core priorities are - does the firm emphasize responsiveness over completeness? Do you emphasize alternative dispute resolution over litigation? Do you emphasize compassion versus aggression? What is most important to the firm, and how do you want to be known?

Set Yourself Apart

To be effective, the mission statement should be unique to you and your practice and reflect your personality.

The problem with many law firm mission statements currently in existence is the same problem lawyers frequently have with their marketing – rather than focusing on who the target audience is, and what their problems are, the focus is only on the firm or lawyer – their education, their skills, etc. The mission statement, just like a good marketing message, must focus on the client – what their problems are, and how your firm solves their problems or meets their needs better or in a different way than your competition does. It's not about you, it's about them, and about being of service to them.

If you substitute the name any other law firm or lawyer that practices in your area of law in your mission statement, is it still true? If it is, your mission statement is too vague.

For example, " To provide quality legal services and practical, effective solutions to individuals and businesses at a fair cost with a focus on client satisfaction " is an ineffective and uninspiring mission statement. It doesn't convey a sense of the firm's uniqueness or culture. It doesn't communicate the kind of services the firm provides, to whom they are provided, or how. This mission statement sets forth the bare the minimum level of service which all clients expect their lawyers to provide – effective solutions at a fair price.

Tips for Writing Vision and Mission Statements

- Be specific, but make sure that the mission statement doesn't become a strategic plan. The mission statement should be an enduring statement of the firm's identity, and should not contain goals and objectives. The specific goals, objectives and actions to be taken by the firm should be incorporated into a plan, but that should be separate from the mission statement.

- Use 'we' to emphasize the firm as a whole, and focus on the firm's culture and strategies.

- Make sure all of your employees can relate to the mission statement – that it inspires all employees to be their best and to work toward a common goal.

- Make it easy to understand – don't use 'lawyer-speak.' Remember, many of your employees are not lawyers, and most (if not all) of your clients are non-lawyers!

- A good mission statement fosters commitment, motivation, and inspiration.

- Seek input from all levels of the organization – from the file clerks, receptionists, secretaries, attorneys, paralegals, etc. This creates 'buy in' for everyone at the firm, makes them feel a part of the team, and provides different perspectives.

- After input is received, the mission statement can be written by an individual or a small committee composed of individuals sensitive to the entire firm's viewpoints, and it should reflect areas of consensus. But do not allow a large group to be involved in the actual writing of the vision and mission statements, as this approach often devolves into nitpicking about comma placement, etc. and accomplishes nothing.

- Set a deadline for completing the mission statement.

- Circulate a draft of the mission statement before it is finalized for review and comment.

- When reviewing the draft, ask yourself: Does this accurately reflect my understanding of the firm and its business? Can the partnership live up to this? Can the individual attorneys live up to it? Can our staff live up to it? Can we operate by this on a daily basis? Are we willing to measure everything the firm does by this?

A Final Word About Implementation

Writing vision and mission statements alone will not bring about change or reduce the feeling of being overwhelmed. To be effective, implementation is essential. Everything in the practice must be based upon and measured against the mission statement. If a client, a project, a charity event, a case, or a method of practicing is not in alignment with the firm's mission statement, the firm risks diluting the firm's identity and power.

Just as any good trial lawyer knows not to make promises in her opening statement that she can't keep, so every law firm should beware of crafting a mission statement which the firm is not prepared to act upon and enforce. Don't create expectations that you can't or won't live up to. If you don't believe your mission statement, why should your client? If the partnership doesn't believe it, why should your associates and staff?

In order to create effective and inspiring vision and mission statements, it is crucial to ensure that the firm leaders are in agreement. Do they all agree with the vision? Do the partners agree on the direction of the firm, the types of clients the firm does and will represent, and the manner in which the clients are serviced? Can all partners articulate and agree upon what sets your firm apart from the competition?

If you want to create a direction for the future of your practice, and a way of doing business that inspires you, your entire firm, and your clients, creating vision and mission statements are a good place to start. Once you have a clear direction, making real progress toward your goals is much easier, and reduces that feeling of being overwhelmed.

Allison C. Shields, a former practicing attorney, helps solo practitioners and law firms reach their maximum potential by providing practice management and marketing strategies through coaching and consulting. You can learn more by visiting her blog at www.legaleaseconsulting.com.

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Workers' Compensation For The General Practitioner

***By Bruce Ridley*[1]**

Introduction

Workers' compensation appears in some form in every state. The concept arose to address injuries in the workplace. When negligence had to be proven, procedures were slow in courts of general jurisdiction, and trial costs were expensive for employers and employers.

Business and labor arrived at a legislative solution.[2] The actual statutes vary extraordinarily by state, but in general labor gave up the right to sue for general damages and business gave up the right to require the worker prove negligence from the employer as the proximate cause of an injury. In each state, the Legislature created an agency—often called a "board" or "commission"—to administer workers' compensation laws. Some, like Washington, also created a separate administrative hearing agency to hear appeals from the industrial agency's decisions.

Workers' compensation statutes and coverage vary greatly by state. If you are not familiar with your state's statutes and agency and court rulings, you may have little or no time to find or learn the appropriate law before your client's rights expire. State laws vary as to:

- Definitions of "industrial injury" and "occupational disease";
- Filing requirements;
- Statutes of limitations for filing claims and perfecting appeals;
- Necessary parties to a proceeding (e.g., all employers in an occupational exposure occurring over time);
- Benefits available for time-loss compensation, loss of earning power,

vocational services, medical and psychiatric treatment, surgery, medication, pensions, and beneficiaries;

- Whether psychiatric conditions and occupational diseases are covered, and to what extent;
- Awards (if any) for permanent partial disability;
- Application of state civil rules or administrative hearing rules;
- Relief to an employer for a worker with prior injuries;
- Right to a jury trial, the number of jurors, and the procedures at hearing;
- Rights on and methods of appeal;
- Calling expert witnesses, and who pays for their testimony;
- Preference or weight to be given to one expert's testimony over others;
- Right to file third-party actions and how to divide up any recoveries from the same; and,
- Attorneys' fees and costs, at all levels.

The quickest manner to access statutes and administrative rules of your state is to use a legal search engine such as LexisNexis. Also, each state's industrial agency, board, or commission will have its own website, and most of those have access to agency rules and decisions and referents to statutes. Many states also have published opinions, guidelines, or other analyses available. The weight a trier of fact gives to such analyses, again, varies by state. For comparative analysis, background history, and a sense of the area of law, *Larson's Workers' Compensation* is the essential treatise for this area of law. The Larson's Desk Set is three thick volumes. It can be difficult to find the area of law you seek if you do not know workers' compensation. *Larson's* is available via LexisNexis.

You cannot rely on one state's law to address a claim in another state. You must know the answer in your state's law. Most industrial agencies have some appeal route to the appellate courts, and the appellate courts differ in the deference they give to agency opinions and the decisions of the appellate courts in other states as to an issue on appeal.

If so much of workers' compensation is wholly a state creation, what can a general article do? Not too much. However, many workers' compensation cases may appear in your office in disguise, as some other type of tort. You may save your client's right if you discern the workers' compensation issue. If you find one and there is no time to refer the client to a skilled practitioner of that law, you may have to act immediately to protect your client's rights before deciding whether to refer a case. You also may protect yourself from a claim against your carrier.

Workers' compensation statutes of limitation tend to be much shorter than general tort statutes, and you may have a worker walk into your office with a claim that must be filed that day or be lost, or have an employer contact you within one or two days of the date by which that company must perfect an appeal or protest a decision.

Recognizing The Issue

Disguise

A workers' compensation case may appear in disguise. Here are elements for which to look:

- Auto, pedestrian, or bus or airplane accident: was the worker in the course of employment at the time of accident, e.g., an errand to pick up something for the business, or an employee or partner on the way to a meeting?
- A fall or other accident on the way to or from work (this varies immensely by state).
- Chemical or biological exposure while working. For example, in many states a hospital worker may be covered for exposure to airborne pathogens because of the law-or-court-perceived greater likelihood of contracting such a condition in a hospital.
- Drug reaction when at least some of the drugs were prescribed for treatment of a work-related condition.
- Assault.
- Terrorist acts.

If any of these issues arise during your initial interview, immediately follow up with questions to ascertain if you have a workers' compensation issue. You may have to act right away.

Injury Or Occupational Disease

Most states define the term "industrial injury" or "injury" as a sudden event of some type. Check your state's definition. This may include one-time exposures to a high level of chemicals, radiation, noise, or bright light.

Almost all states cover at least some "occupational diseases," conditions arising slowly over time. This is one of the most varied areas of workers' compensation law. Different states allow or reject conditions arising over time from

- Slow, minute repetitive trauma, such as carpal tunnel syndrome from keyboarding, operating a pneumatic drill, or driving a truck or bus;
- Loss of hearing, vision, or sense of smell;
- Transmitted diseases (e.g., colds or pneumonia in hospital employees);
- Continuing psychological stress in the workplace;
- Chemical exposures;
- Asthma and other respiratory diseases;
- Repetitive low back trauma; and,
- Vascular diseases.

Each state has different requirements for what does or does not qualify as an occupational disease. Some are very precise. You cannot just throw facts against a wall to see what sticks: you must be very precise. Seek out the requirements. They can exist in a statute, an administrative code section, or case law. Most likely, there will be case law interpreting any statutes or code sections. This area of the law is often litigated.

Statutes Of Limitation

These, too, vary immensely by state. For the most part, the time for filing is *less* than a tort claim. Some states require an employer to report an injury to the workers' compensation agency, but others do not, so a worker's report of an injury to his or her employer may or may not meet the requirement for filing a claim. In many states, this type of report to an employer does not act as a filing of the claim.

What constitutes an appropriate filing varies by state, too. All states have forms for applying for benefits as an injured worker. In some, the employer has the forms. In many, doctors and other medical professionals have the forms. Most workers' compensation agencies have such forms available on their websites. However, many states are tending to allow any type of application of a type likely to put the workers' compensation agency on notice that the worker is alleging an industrially related condition.

In some states, certain situations may toll the statute of limitation for filing[3]:

- Mental or physical incompetence, in the absence of appointment of a guardian;
- Extreme illiteracy;
- Inability to understand English;
- Minority;
- Absence from the country; military service.

Generally, a mistake of law does not constitute an excuse for the late filing of a claim.

In most states, the negligence of a claimant's attorney does not toll the statute of limitation. In a very few states, it does. Imprisonment may or may not toll the statute of limitation.

If you represent an injured worker or an employer filing a counter-claim, file the claim. You may be able later to amend any application, protest, or notice of appeal, but not if you miss that filing deadline. The statute of limitation for occupational diseases may be especially intricate. The key is to beat that deadline.

If you represent an employer who has been notified of such a claim, check to see that it was filed within the time the statute of limitation allows. If the worker did not file in a timely fashion, your client may have a quick resolution to its potential liability.

When A Claim Is Open

All parties to the claim should oversee the process of the claim. Workers have to follow guidelines and procedures. Claimants' counsel should make certain a worker follows through with treatment, vocational retraining, and appearing for scheduled independent medical examinations. Failure to do so can cause suspension of benefits and claim closure.

Employers have to follow procedures for providing benefits, and so do the workers' compensation agencies. Most states have fines for failure to provide benefits when ordered by a workers' compensation agency, and in some states the agency has the authority to suspend a company's right to process claims of the company's employees if that processing is done improperly. It is important for an attorney representing an employer to know the requirements, expectations, and authority of the agency in that regard and to inform the client accordingly.

Appealing Determinations

All states have statutes of limitations for responding to orders from the workers' compensation agency or self-insurer. These statutes vary in length, but most are no more than two months, and some are less.[4] If a worker or employer comes into your office with an order, check the statute of limitations. If the response, protest, appeal or other formal filing is due, you must respond. Some attorneys in such situations appropriately file a blanket response to any extent workers' compensation agency determinations.

Each state has requirements on where and how to file such responses.

Hearings

Many tort attorneys may make the error of considering a worker's compensation claim to be a sort of "little" or "simple" tort claim. Nothing could be farther from the truth. The amounts at issue may be less, but each type of case has very specific requirements, by state, and many of those requirements do not exist in general tort cases. For instance, in Washington State, the party asserting a claim should be reopened because a condition has worsened has to prove the objective findings of the condition on the date it last was closed in order to compare those findings with the findings on the date on which the party is asserting the claim should have been reopened. Almost every state has different requirements for proving occupational diseases.

Summary

Workers' compensation is not a simple area of the law. Legal traps abound for the unwary. It calls for a specialized type of law practice, with great attention to requirements for filing. If you have a case come in, as a threshold matter you must determine if any action is needed immediately. Even if you intend to refer the case to an attorney or firm specializing in workers' compensation law, you may have to appear and take immediate action to preserve your client's rights before referring the case.

On the other hand, a practice concentrating on workers' compensation and social security can be remunerative. The amount received on any one case initially might be small for a claimant's attorney, and the hourly rate for employers' attorneys may be less than in some other areas of law. However, as the initial creators of workers' compensation law stated, injuries at work will happen and are a cost of doing business. Even with all OSHA or State-OSHA requirements, injuries will continue to occur, and parties are likely to dispute coverage and benefits.

The three keys to workers' compensation are the same as in most law practice: preparation, awareness of the many statutes of limitation, and attention to detail as to preparation of evidence and the requirements for proof of the issue at bar.

The Honorable Bruce Ridley is an Industrial Appeals Judge on the Washington Board of Industrial Insurance Appeals

[1] This article is the opinion and work product of Bruce Ridley and not of the Board of Industrial Insurance Appeals.

[2] *Larson's Workers' Compensation*, Section 1.01

[3] *Larson's Workers Compensation*, Section 126.09

[4] But see the section on tolling the statutes of limitation discussed above

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Selling Food in the European Union

(The following article is a summary of a project to provide advice to Illinois farmers wishing to engage in value added work by selling a ready to eat meal in the European Union.[1] The full article is available on Ostfeld's web site at www.ostfeldlaw.com.)

For those looking for the information, the world has been battling during the last few years over subsidies to the agriculture industry. Not only are there issues over how much each country can subsidize its ag industry, or how much it should reduce these subsidies, but also what types of tariffs and prohibitions can be placed on the importation of food, whether it is ready to eat or on the hoof.

The United States has essentially won the right to export meat to the European Union, as well as Japan and other countries which try to keep it out for a variety of reasons. However, there have been little real signs of success in opening the markets there. Consumers continue to shy away from American meat, although hotels seem to be importing it, and new reasons are found to keep it out of the marketplace.

The sale of other products is subject to investigation as to whether they pass European standards developed to ensure the safety of the food. These can be onerous and time consuming.

But, the whole process of opening markets if fluid. While things look dark now, there is reason to think that restrictions may and will change in the future. The purpose of this article, and the underlying project, is to make the adviser to farmers and food producers aware of what is happening and where the resources are.

The battle over the use of crops from or involving genetically modified organisms ("GMO") continues, although many countries accept the importation or planting of corn without being concerned that this is one of the original GMO crops. The battle is not over, however, because many farmers, and others, in the countries which restrict the importation and use of GMO crops, would like to be able to plant them. They recognize that certain GMO crops can increase their yield without any side effects. As do American farmers, the European farmers want to be competitive with the farmers in Brazil.

Unfortunately, the use of GMO crops or American meat is not politically popular amongst people who believe that their governments do too little to ensure the safety of what they eat. They have some history to support their fears, whether it be mad cow disease, listeria, or tainted blood transfusions. They hear stories about the content of American food and want to wait another generation, before freely accepting it into their marketplace.

To assuage their fears, and to avoid repercussions within the framework of the World Trade Organization, the European Union ("EU") has adopted seemingly innocuous rules which effectively slow down American penetration of many food markets. Sales can be made but it takes knowledge of the rules and time to have the products evaluated and accepted by the administrative authorities.

The legislation, governing what food can be imported into the EU, comes about through the issuance of regulations, which completely bind the member states, directives, which bind the member states as to the results to be achieved but not as to the means, and decisions, which are intended to be uniform within the EU and not rendered independently on a case by case basis. (see, www.eseu.be/agri/customs.html, and www.eseu.be/agri). As a result, labeling requirements issued under a directive will be the same for all of the countries within the EU but the administrative procedures to be followed, and the agencies to be contacted, will be subject to individual country regulations. Help with this can be obtained from the United States Department of Agriculture through its Foreign Agricultural Service U.S. Mission to the European Union (FAS). (see, www.useu.be/agri/fairs.html).

A product entering the EU can be sent throughout the region without incurring further duties, as is the case in the U.S. However, there can be differences in time to process and fees to be paid depending on which port of entry is chosen. Again, the FAS, or even some state Departments of Agriculture, can be quite helpful with relevant information.

The seller has the normal labeling requirements, that he does here, which indicate the weight and content of the item and its shelf life. Attention needs to be paid to any claims, particularly health claims. The seller should not transform a food product into something approaching a medicine, by claiming too strongly its healthy attributes, or he will risk the product being regulated as a drug. The label needs to be in a language easily understood by the consumer. This means that it must be translated into one or more other languages in the EU, depending on the target market. There is a certain logic to this, if the seller wants the consumer in another country to understand what the product is.

Lynne R. Ostfeld is Chair, International Law Committee and Vice-Chair, Agricultural Committee, of the ABA General Practice, Solo & Small Firm Division)

[1]This project was done by an L.L.M. level class in International Agri-Business Law, at The John Marshall Law School. It was organized and taught by adjunct professor, Lynne R. Ostfeld, a solo practitioner who has an "of counsel" relationship with a French law firm and is an accredited attorney to the French Consulate in Chicago. She was assisted by Professor Mark Wojcik of the John Marshall Law School, who taught a class on international legal research and the U.S. Court of International Trade; Thomas M. Keating (Hodes Keating & Pilon, Chicago) who taught a class on customs and treaties affecting agriculture; Nicole Coutrelis, (Coutrelis & Associés, Paris and Brussels) who taught a class on importing agricultural products and food into the European Union; Richard E. Schell (Law Offices of Kurt A. Wagner, Des Plaines) who taught a class on immigration and the need/use of foreign "guest" workers; Eugene F. Friedman (Friedman & Friedman, Chicago) who taught a class on intellectual property. The students who worked on the project were Juli Campagna, David Bickel, Adriana Casati, Daniel Meza, Bryan Moore. Ms Campagna deserves special commendation for her yeoman's work in consolidating disparate parts, writing a significant portion of the memo, and editing the final product. Further information about this memorandum, or the program can be had by contacting Prof. Ostfeld at ostfeld@mindspring.com. The full article is available on Lynne Ostfeld's web site at : www.ostfeldlaw.com.

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Creating A Family Foundation

By Michelle Coleman-Johnson

The "family foundation" has become the latest accessory for the philanthropic wealthy family. Interest in this charitable giving vehicle has become widespread, to include families of moderate wealth, in addition to the more traditional "foundation" family, but clients rarely have prior knowledge or understanding of the private foundation rules and restrictions. In this planning process, the practitioner should help the client determine if a private foundation is a good fit for the client and his or her philanthropic goals, giving due consideration to the restrictions and excise taxes associated with this form of entity.

An initial inquiry should address the client's vision for this new foundation. Will it seek contributions from the public or be funded by one family? Does the client wish to retain control? Private foundations best suit clients who plan to fund the foundation themselves and control its operations. Although this article focuses on the formation and operation of a private non-operating foundation, several alternatives to a private foundation may be a better fit for an individual client. An understanding of the client's intentions and goals for the future can help the practitioner properly advise the client and guide the client to the appropriate vehicle for its philanthropic vision. These alternatives include private operating foundations (created to directly carry on one or more charitable activities), supporting organizations (organized and operated to support one or more public charities), and publicly supported charities (which must meet specific support tests to maintain favorable public charity status). Another consideration is for the client to establish a donor advised fund with a community foundation. With a donor advised fund, a donor has the ability to recommend the charitable recipients of its fund without the burdens associated with the administration of a private foundation.

The client should be advised that the private foundation requires ongoing monitoring and administration and that many transactions between the donor and the foundation will be prohibited. Despite the restrictions, the advantages of the private foundation make it attractive to the wealthy client. The most important advantage is the degree of control the client can exert over the foundation. The private foundation is also a great method to involve family members who may or may not be involved in the family business, and it can be drafted to involve the younger generation at an early age as junior advisors. In this regard, the private foundation is an effective estate planning tool to integrate members of the family who might not otherwise be involved. This article describes the major considerations in the planning, creation, and operation of private non-operating foundations. As such, it is an introduction for the practitioner in advising on the operation of such an entity.

Presumption of Private Foundation Status

An organization organized and operated for charitable purposes is presumed to be a private foundation unless it demonstrates that it fits one of the exceptions listed in Code § 509(a): (1) organizations that are, by definition or activity, public charities (described in Code § 509(a)(1) and Code § 170(b)(1)(A)(i)-(v)); (2) publicly supported charities (Code § 509(a)(2) or Code § 170(b)(1)(A)(vi)); (3) supporting organizations (Code § 509(a)(3)); or (4) organizations organized and operated exclusively to test for public safety (Code § 509(a)(4)).

If a charitable organization does not qualify as one of the four types of organizations described above, then it is a private foundation. Private foundations themselves can be divided into two groups: (1) private operating foundations that directly carry out a charitable activity and are exempt from certain distribution and other requirements and (2) private non-operating foundations, which do not directly perform any charitable programs or services, but rather receive charitable gifts, invest the funds, and make grants to other charitable organizations. It generally receives its funding from one primary source, such as an individual, a family, or a corporation. The most common type of private foundation is the non-operating foundation, and it is the focus of this article.

Organization of a Private Foundation -- Form of Entity

The foundation is established by the creation of a nonprofit entity under applicable state law. A corporation is generally the preferred entity for the private foundation, because it provides greater protection from liability for the organization's officers and directors, but the foundation can also be in the form of a charitable trust. The decisions of directors in a corporate structure are usually evaluated according to the business judgment rule, as opposed to the more strict fiduciary standards applicable to trustees of trusts. Careful drafting of corporate documents can provide for family line succession as members or directors of the foundation. A trust format can be made very inflexible, which may be advantageous for a founder who wants the tightest control possible after his or her death or incapacity.

The foundation may be created during life or by testamentary disposition. The preferred method is to create the foundation during the founder's life and obtain the tax exemption from the IRS. If the foundation is not fully funded during life, it can be funded at the founder's death. If created at death, organizational documents may need to be revised to obtain exempt status, and a trust format may require court approval. Exempt status at death is needed to obtain the estate tax charitable deduction, and if a defect in the document precludes the relation back of exemption to death, the estate tax charitable deduction could be denied.

Organizational documents should be in compliance with applicable state law. To comply with federal law, the organizational documents should state that the organization is organized and operated exclusively for its exempt purpose and should define the exempt purpose (charitable, educational, or similar charitable purpose). There should be a prohibition upon the earnings of the foundation inuring to any insider and a prohibition upon private benefit. The document should contain a statement that no part of the foundation's activities shall consist of attempts to influence legislation and that it shall not participate in political campaigns. In addition, there should be a statement that the corporation will comply with the requirements of Code § § 4941 through 4945. (Sample language for these trust or corporate provisions can be found in IRS Publication 557, Tax-Exempt Status for Your Organization.)

Application for Exempt Status

Form 1023, Application for Recognition of Exemption Under § 501(c)(3) of the Internal Revenue Code should be filed within 15 months from the end of the month of the foundation's organization. An automatic extension allows filing within 27 months of the foundation's organization. Further extension may be granted for reasonable action, good faith, and a showing of no prejudice to the government. If Form 1023 is timely filed, exempt status will relate back to the date of organization. Otherwise, exempt status relates back only to the date of filing of Form 1023. Occasionally, the IRS will request supplemental information about the foundation, especially if the foundation has been funded before the application for exempt status has been filed. For this reason, the author advises clients not to fund until a determination letter is received.

If Form 1023 is approved, the IRS will issue a "determination letter" as evidence that the foundation is exempt as organized under Code § 501(c)(3). Once exempt status is granted, many states grant exemption from state income and franchise taxes once they are provided with a copy of the IRS determination letter. Procedures vary from state to state.

Operation of a Private Foundation -- Restrictions

Private foundations are subject to the following restrictions: (1) a tax of 2% (can be reduced to 1%) of the net investment income of a private foundation for the taxable year (not applicable to operating foundations), (2) restrictions on acts of self-dealing, (3) minimum requirements for distribution of income, (4) restrictions on retention of "excess business holdings," (5) restrictions on investing assets in a manner that jeopardize the carrying out of the exempt purposes, (6) restrictions on expenditures, and (7) tax upon termination of status as a private foundation, unless certain requirements are met. Private foundations are not subject to the intermediate sanctions rules applicable to public charities under Code § 4958. Although beyond the scope of this article, private foundations are subject to other rules related to Code § 501(c)(3) organizations, such as prohibitions upon private inurement or private benefit and taxes on unrelated business income.

Excise Tax on Investment Income (Code § 4940)

Private foundations are subject to several excise taxes. One of these excise taxes, which cannot be avoided but can be reduced, is the excise tax on investment income. The private foundation is usually subject to an excise tax of 2% of its net investment income. If the private foundation distributes to qualified charities a total amount for the year that exceeds the sum of (1) the product of the current value of the foundation assets times the average percentage payout during the preceding five years (which is the average of the qualifying distributions for each year divided by the value of the foundation assets for that year) and (2) 1% of the foundation's net investment income for the year, the tax may be reduced to 1% for that year.

Excise Tax on Acts of Self-Dealing (Code § 4941)

In addition to the excise tax on investment income, the private foundation is subject to excise taxes on certain prohibited transactions.

Because of the retention of control by a donor over a private foundation, there are prohibitions upon acts of self-dealing between a disqualified person and a private foundation. These prohibitions are not limited to one-sided transactions but (subject to certain exceptions described below) apply to all dealings between the private foundation and "disqualified persons," regardless of whether the private foundation is harmed by the transaction. Self-dealing can be direct or indirect and includes:

. any sale, exchange, or lease of property between the private foundation and the disqualified person;

. lending of money or extension of credit between a private foundation and a disqualified person;

. furnishing of goods, services, or facilities between a private foundation and a disqualified person (unless such goods, services, or facilities are made available to the general public on at least as favorable a basis as they are made to the disqualified person);

. payment of compensation (or payment or reimbursement of expenses) by a private foundation to a disqualified person (unless for personal services reasonable and necessary to carry out the exempt purposes and not excessive);

. transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation; and

. agreement by a private foundation to make any payment of money or other property to a government official other than an agreement to employ such individual for any period after determination of his government service if such individual is terminating his government service within a 90-day period.

Caution should be taken in reimbursing directors for travel expenses or other out-of-pocket expenses. Such reimbursement of expenses will not be taxed as self-dealing if the expenses are reasonable and necessary to carrying out the exempt purposes of the foundation and are not excessive.

Disqualified persons include substantial contributors, foundation managers (officer, director, or trustee of the foundation or an individual having duties similar to those of officer, director, or trustee), persons owning more than 20% of an entity that is a substantial contributor to the foundation, a member of the family (spouse, descendants, and spouses of descendants), or an entity in which any of the above persons own more than 35%. A substantial contributor to the foundation is an individual, trust, estate, corporation, or partnership that contributes an aggregate amount of more than $5,000 to the foundation, if such amount is more than 2% of the total contributions and bequests received by the foundation (from its inception) before the close of the taxable year in which the contribution is received.

For any act of self-dealing, the disqualified person who engages in this self-dealing is assessed an excise tax of 5% of the amount involved in the transaction for each year that the transaction is uncorrected. In addition, a foundation manager who willingly participates in the act, knowing it is prohibited, is subject to a tax of 2.5% of the amount involved (not to exceed $10,000 for each such act) for each year that the transaction is uncorrected. If the transaction is not timely corrected and the 5% is initially assessed, the disqualified person is subject to an additional tax of 200% of the amount involved. Any foundation manager who does not correct the transaction may be subject to an additional assessment of 50% of the amount involved (not to exceed $10,000 for each such act). If more than one foundation manager is liable under this section, such persons are jointly and severally liable.

Excise Tax on Failure to Distribute Income (Code § 4942)

Code § 4942 imposes a tax on the undistributed income of a private foundation. To avoid this penalty, a private foundation must generally make qualifying distributions of a "distributable amount" that is based on a minimum investment return of 5%. If the "distributable amount" is not distributed by the close of the following taxable year, the foundation is assessed a penalty of 15% of the difference between the distributable amount and the amount actually distributed. An additional penalty of 100% of the undistributed amount is assessed if the original penalty is assessed and the distribution is not timely made. Penalties apply only to the foundation and not to the foundation manager.

Qualifying distributions include grants to charities and noncharities for charitable purposes, costs of all direct charitable activities (such as running a library or art gallery, providing technical assistance to grantees, and maintaining a historical site, among other things), amounts paid to acquire assets used directly in carrying out charitable purposes, set asides, program-related investments, and all reasonable administrative expenses necessary for the conduct of the charitable activities of the foundation.

Excise Tax on Excess Business Holdings (Code § 4943)

To prevent private foundations from having an advantage over other businesses that operate in the taxable income sector, there are restrictions on a private foundation's ability to engage in certain business activities. The Code defines these holdings in terms of permitted holdings. The foundation may own 20% of the voting stock in a corporation, reduced by the percentage of voting stock held by all disqualified persons. If the control of the entity can be shown to be held by nondisqualified persons, the foundation and the disqualified persons may own 35% of the entity's voting interest. The foundation may hold a nonvoting interest, but only if all disqualified persons together hold 20% or less of the voting interest. The private foundation has five years to dispose of these excess business holdings acquired by gift or bequest. The disposal must be to a nondisqualified person. In addition, during the five-year period, the excess business holdings will be treated as held by a disqualified person, rather than by the foundation. A de minimis rule allows the private foundation to own at least 2% of a business entity. Other exceptions apply to unusual gifts and bequests for which a private foundation may be granted an additional five-year period to dispose of an excess business holding, if certain conditions are met.

The foundation is taxed on its excess business holdings in the amount of 5% of the value of each excess business holding. A penalty of 2% is imposed on the foundation if the initial penalty is assessed and the excess business holding is not timely corrected. A private foundation has a five-year time period to dispose of the excess business holding, but the disposition of such holding is subject to the restrictions against acts of self-dealing.

Excise Tax on Jeopardizing Investments (Code § 4944)

The foundation is not allowed to invest its funds in investments that could jeopardize the foundation's ability to carry on its exempt purpose. If it does, a tax is imposed on the foundation equal to 5% of the amount of the improperly invested assets. In addition, each foundation manager who willfully participated in the making of the investment knowing that it jeopardized the carrying out of the foundation's exempt purposes is assessed a tax of 5% of the amount of the improper investment (not to exceed $5,000 for each such act). If the jeopardizing investment is not disposed of within the taxable period, the foundation is assessed an additional tax of 25% of the amount improperly invested and each foundation manager who willfully participated in the making of the investment knowing that it jeopardized the carrying out of the foundation's exempt purposes is assessed an additional tax of 5% of the amount of the improper investment (not to exceed $10,000 for each such act). The taxable period begins on the date of investment and ends the earlier of (1) the date of the mailing of a deficiency, (2) the date on which the tax is assessed, or (3) the date on which the investment is removed from jeopardy.

Although there is no per se jeopardy investment, some examples of investments that warrant close scrutiny are trading in securities on margin, trading in commodity futures, investments in working interests in oil and gas wells, the purchase of puts, calls, and straddles, the purchase of warrants, and selling short. The jeopardy investment rule requires close scrutiny of foundation managers' standard of care. The foundation managers will be held to a "prudent investor" standard of care. Caution should be exercised in the consideration of speculative or high-risk investments. This restriction applies to investment actions by the foundation managers and does not apply to assets received by a private foundation by gift or bequest.

Excise Tax on Taxable Expenditures (Code § 4945)

The foundation is subject to a 10% tax on each "taxable expenditure," and any foundation manager who willingly participates in making the distribution knowing it is a taxable expenditure, without reasonable cause, is subject to a 2.5% tax on such taxable expenditure. If the expenditure is not corrected within the taxable period, the foundation is subject to a tax of 100% of the amount of the taxable expenditure, and the foundation manager is subject to a tax of 50% of the amount of the taxable expenditure if the foundation manager refuses to correct the transaction. The taxable period is the date starting when the expenditure is made and ending on the earlier of the date (1) of mailing a notice of deficiency or (2) when the tax is assessed.

Taxable expenditures include payments for noncharitable purposes or to nonqualifying recipients, including political campaigns and lobbying and certain grants to individuals. If a foundation makes a distribution to an individual or to a for-profit entity (or a tax-exempt entity that is not charitable under Code § 501(c)(3)), it must exercise expenditure responsibility (that is, it must monitor the use of the grant) to avoid a penalty. Expenditure responsibility includes conducting a pre-grant inquiry concerning grantee's management and programs, obtaining a written agreement from the grantee before making the grant, obtaining regular written status reports from the grantee regarding its progress in using the grant, and filing reports regarding the grant's status with the private foundation's annual information return. Grants must be awarded on an objective and nondiscriminatory basis.

Grants to individuals for study, travel, or similar purposes are taxable expenditures unless certain requirements are met, including prior approval by the IRS. See Code § 4945 and related Treasury Regulations. Grants to individuals for charitable purposes do not require IRS approval, but diligent record keeping of the decision-making process and monitoring of the use of the grant is highly recommended for the foundation to demonstrate that the grant served a public and not a private interest.

As part of its grant making procedures, the private foundation should (1) obtain a copy of the grantee organization's determination letter granting exempt status as a public charity, (2) verify that the grantee is listed in the most current Publication 78, Cumulative List of Exempt Organizations (a searchable version is available online at www.irs.gov), (3) review the grantee's current Form 990, Schedule A, Part IV, to review its proof of non-private status, and (4) file reports, if necessary, regarding the grant's status with the private foundation's annual information return, checking the appropriate box pertaining to expenditure responsibility.

Limitations on Donor's Income Tax Charitable Deduction

In addition to the restrictions and excise taxes imposed on private foundations, other rules and limitations regarding private foundations make them less attractive to donors. For gifts of cash and non-appreciated property, a donor's income tax deduction is limited to an amount equal to 30% of the donor's adjusted gross income in the taxable year, as opposed to 50% for gifts of cash and other non-appreciated property to public charities and to other foundations that qualify as public charities. Any excess can be carried forward for the next five years. The deduction may be zero, however, if the donor has contributed capital gain property to public charities in excess of the 30% deduction limitation. Corporate contributions are limited to 10% of taxable income with a five-year carry forward of excess contributions. For gifts of appreciated property, a donor's income tax deduction is limited to 20% of the donor's adjusted gross income, as opposed to 30% for gifts of appreciated property to public charities. In addition, gifts of appreciated assets are limited to a deduction of only the donor's basis in the asset, unless the asset is publicly traded stock. Any excess can be carried forward for the next five years. But there is an exception to the deduction rules for gifts to certain private foundations that are treated as pass-through foundations. If a foundation meets the criteria of Code § 170(b)(1)(E)(ii) (pass-through foundation), the donor may receive a deduction as if the gift were made to a public charity. A pass-through foundation is described as any foundation which makes qualifying distributions in an amount equal to 100% of the foundation's contributions for the year before the fifteenth day of the third month following the close of the foundation's taxable year. No special election is necessary; the foundation should just make the appropriate qualifying distributions. To substantiate the higher deduction, the taxpayer must obtain adequate records or other sufficient evidence from the foundation showing that the foundation made the appropriate qualifying distributions. Pass-through treatment of a foundation may be an attractive planning tool for a founder who would be willing to make the required distributions from the foundation during his or her life to receive the 50% deduction, and then further endow the foundation at his or her death.

Advantages of a Private Foundation

The private foundation provides more control to the donor than does a donation to a community foundation or supporting organization, because the donor has the right to distribute the foundation assets to organizations (public charities) he or she prefers and because he or she can stay in control of the foundation's investments. The foundation often makes the donations for the family. This is efficient for the philanthropic family: it designates one entity to receive all requests for donations, creating a "family office" that can field requests for funds. The establishment of grant procedures and review of grant applications by the board of directors or a committee of the board makes the grant approval process more objective, since applications must meet pre-set criteria. This can alleviate pressure placed on family members by grant-seeking organizations or individuals. In addition, special drafting of the organizational documents can maintain the family line as members or directors of the foundation. The family foundation can give younger family members an opportunity to participate in a meaningful endeavor and become familiar with the charitable goals, intentions, and business management philosophies of the foundation's creator.

In short, the private foundation is a useful tool that can be integrated with a client's estate and wealth migration plan. If a client is willing to "play by the rules," a family foundation can be a successful and enjoyable endeavor for the entire family.

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Estate Planning

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What Estate Lawyers Need To Know About HIPAA And "Protected Health Information”

By Daniel B. Evans

If you've been to a doctor or hospital in the last few months, you've been asked to sign a piece of paper titled something like "HIPAA Notice of Privacy Practices," which probably told you all sorts of stuff about your medical records that you either didn't understand or didn't really care about. Well, the same federal law that has doctors asking patients to sign all of those pieces of paper also imposes penalties on doctors (and hospitals and other health care providers) who make unauthorized disclosures of "protected health information" about their patients. The new rules mean that health care providers are not going to be talking about (or otherwise disclosing information about) the medical condition of a patient to the families of the patient or the lawyer for the patient. These restrictions on disclosing information can lead to problems when families and lawyers are trying to figure out whether the patient is disabled for purposes of durable powers of attorney, advance medical directives, trusts, employment contracts, and other kinds of contracts and documents.

This article discusses how HIPAA regulations may affect various estate planning documents and practices. Although the new rules may cause problems for family members trying to learn about the medical condition of a patient from a doctor, the problems that most estate planning lawyers will confront relate to how HIPAA regulations relating to "personal representatives" and "valid authorizations" apply to powers of attorney and other estate planning documents and procedures.

Powers of Attorney

Many practitioners have expressed concerns that durable powers of attorney that include the power to make medical decisions (or durable health care powers of attorney) may need to be rewritten to comply with HIPAA. Several legal groups and individual lawyers have published new language (sometimes very lengthy and complex language) that they recommend be added to forms of powers of attorney. The language of the HIPAA regulations, however, shows that no changes should be needed for powers of attorney that, in conformity with the statutes or court decisions of the relevant state, validly authorize the attorney in fact to make medical decisions for the principal.

The regulations under HIPAA require health care providers to treat the personal representative in the same way as the patient, and a "personal representative" is the person who, under applicable law, has the power to make medical decisions for the patient. A properly authorized attorney-in-fact who has the power to make medical decisions for the principal under state law should qualify as a "personal representative" under the regulations and should be entitled to the same medical information as the principal.

Practitioners redrafting powers of attorney to include specific powers relating to health information should also consider that the HIPAA regulations do not contain any provisions that would give any legal effect to a power of attorney created for the purpose of receiving health information or authorizing disclosures of health information. To be a "personal representative," a person needs to have the authority to make medical decisions for the patient. Once a person has that power, all other powers granted by the document relating to medical information are redundant. Drafting a document to specifically authorize an attorney-in-fact to receive or disclose health information appears to be a waste of paper and ink, because there is no such thing as a "personal representative" of the patient who has the power to authorize disclosures but does not have the power to make medical decisions.

To make sure that an attorney-in-fact under a durable power of attorney has access to health information, it might be possible to write a broad "valid authorization" in favor of the attorney, but that may be contrary to the spirit and structure of the regulations. The regulations are consistent with the principle that a person who has the power to make medical decisions for a patient should be entitled to the same medical information as the patient, but the regulations seem to be hostile (or at least suspicious) of disclosures by written authorizations. As explained above, written authorizations are supposed to be "specific" in what is to be disclosed, for what purpose, from whom, to whom, and for how long. A broad general authorization to disclose all medical information from all sources, with no time limit, might not be valid under the regulations (or at least may raise enough of a question about the application of the regulations that health care providers may hesitate before honoring such a document).

Most of the problems that are being encountered with health care professionals, HIPAA, protected health information, and powers of attorney are undoubtedly due to the newness of the regulations and unfamiliarity with their scope and application. Many of these problems should disappear with time so that, in the long run, the best way to make sure that an attorney-in-fact under a power of attorney has access to all medical information is to make sure that the attorney-in-fact has the power to make all medical decisions, and not through additional wording in waivers or authorizations.

"Springing" Powers

A "springing" power of attorney (a power that takes effect only on the disability of the principal) may create new problems under HIPAA, because an incapacitated principal cannot authorize access to the medical information needed to prove that the principal is incapacitated.

To avoid court proceedings and litigation--the purpose of most, if not all, powers of attorney--many springing powers state that the principal shall be deemed to be disabled on the written opinions of some specific number of physicians. But under the HIPAA regulations, the principal's physicians are prohibited from disclosing information about the principal's medical condition without the permission of the principal or the personal representative of the principal. The principal cannot give permission because the principal is already incapacitated. The attorney-in-fact under the power of attorney is not the "personal representative" and cannot give permission, because the attorney will have the power to make medical decisions for the principal only after the power of attorney becomes effective and the power of attorney will not be effective until after the physicians have given their opinions.

The best solutions to this Catch-22 are to either (1) stop using springing powers or (2) arrange for the principal to sign a separate "valid authorization" along with any springing power, so that the principal's physicians are authorized to disclose the protected health information relevant to whether or not the principal is suffering from a disability.

Health Care Declarations ("Living Wills")

Many advance health care declarations (or "living wills") appoint an attorney-in-fact or "surrogate" to make health care decisions in the event that the declaration becomes effective (which is usually when the signer has become incompetent and is either in a terminal condition or in a state of "permanent unconsciousness").

Consistent with the HIPAA regulations, an attorney-in-fact or "surrogate" appointed under an advance health care declaration will not be treated like the declarant for all disclosure purposes, but will be treated as a "personal representative" only after the advance health care declaration becomes effective. Usually the declaration becomes effective only after the declarant is incompetent or unable to communicate his or her wishes and is in a terminal condition or in a state of permanent unconsciousness. (The laws on this may vary from state to state.) Until the declaration is actually effective, however, health care providers could refuse to provide medical information to the surrogate named in the declaration. So, for example, if the patient is incompetent but not yet in a terminal condition, the surrogate might not be entitled to medical information. Furthermore, because the authority of the surrogate could be seen as limited in scope (that is, the surrogate is only authorized to decide whether a medical treatment will unnecessarily prolong life or is necessary to relieve pain), a health care provider could limit the disclosures of protected health information to the surrogate to the information relevant to those decisions.

Whether limitations on the information and authority of a surrogate under an advance health care declaration are a problem depends on how practitioners and their clients see the role of the surrogate. If it is believed to be necessary or advisable for a family member to have full access to all medical information even before a patient might be incompetent or in a terminal condition, the best solution is to make sure that a durable power of attorney with the authority to make medical decisions, or a durable health care power of attorney, is in force rather than to attempt to revise or re-word an advance health care declaration.

Guardianship Proceedings

Like "springing" powers of attorney, guardianship proceedings themselves may be subject to an additional procedural hurdle to authorize the physicians of the alleged incapacitated person to testify in court and to disclose protected health information.

The HIPAA regulations specifically recognize judicial proceedings as an authorized disclosure. 45 C.F.R. § 164.512(e). But the regulations draw a distinction between an order of the court and a subpoena, and health care providers are not necessarily required to comply with subpoenas unless certain conditions are met. See 45 C.F.R. § 164.512(e)(1)(ii). To obtain a court order and not just a subpoena, the lawyer may need to file a petition and get a preliminary order for the disclosure of medical records and the testimony of physicians before an actual hearing on the issue of incapacity can be held. The necessity of this step will ultimately depend on whether health care providers are willing to honor a subpoena in guardianship proceedings or whether they will require a court order. Only time will tell what policies or attitudes the health care industry will adopt.

Trust Agreements

Like "springing" powers of attorney, many revocable trusts provide for the removal of the grantor as trustee, for changes in distributions, or for other consequences on the disability of the grantor. And, once again, many documents define the "disability" of the grantor in terms of an opinion by physicians that the physicians may not be willing to provide without compliance with HIPAA. It would seem that there could be four possible solutions to this problem.

One possible solution is to change the language of the revocable trust so that a failure of the trustee to authorize the release of the medical information necessary for the opinion of the physicians would itself become an event causing the grantor to be removed as trustee or otherwise considered to be disabled for the purpose of the trust. So, if the grantor were unable or unwilling to authorize the release of the medical information, the disability provisions would automatically take effect.

Another possible solution is to arrange for a separate authorization for the disclosure of the protected health information needed for the opinion of the physicians. Although a broad and unlimited authorization might not be a "valid authorization" under the regulations, an authorization for the specific purpose of determining disability within the meaning of the trust document should be specific enough to pass muster under anything but the most stringent reading of the regulations.

A third possible solution is to include an authorization for the disclosure of the necessary health information within the trust agreement itself. As discussed above, this is not recommended because the health care provider that discloses the health information will then be required to keep a copy of the trust document (45 C.F.R. § 164.508(b)(6)), which seems like a needless disclosure of the client's estate planning documents.

Finally, the revocable trust could provide that one or more designated family members (or family friends or other disinterested parties) will make the determination of disability. If the decision maker is someone not covered by HIPAA, and if the determination can be made without access to health information protected by HIPAA, then the HIPAA requirements will not block a determination that the grantor should step down as trustee. Of course, this solution potentially offers less protection to the grantor of the trust, because the determination of disability will depend not on a professional opinion but on the conclusion of someone close to the grantor that the grantor can no longer function as a trustee. Often, however, family members or others close to the grantor will be aware that the grantor should no longer manage the trust, even without technical medical information. If the grantor has family members or friends who can be trusted to make this determination, this strategy offers a simplified process.

Employment and Other Contracts

Other documents related to estate planning may include definitions of disability or a need for medical determinations, including employment agreements with disability benefits, shareholder or partnership agreements that allow or require transfers of business interests on disability, and possibly even antenuptial agreements or separation agreements. In each case, practitioners will need to reconsider how to get the necessary authorizations for the disclosure of health information.

When providing evidence of disability will benefit the individual, then it would seem that very little needs to be done except to make sure that the individual has executed a durable power of attorney that includes the power to make medical decisions.

The more difficult cases will be those in which it is to the benefit of other parties to demonstrate the disability of the individual and to the benefit of the individual to contest the existence of a disability. In those cases the best drafting solutions will probably follow the suggestions made above for revocable trusts. That is, the documents could be drafted so as to put the burden of proof on the individual and for the other parties to the contracts to be able to claim the existence of a disability if the individual is unable (or unwilling) to execute a valid authorization to disclose the necessary health information. Alternatively, the individual could sign a valid authorization for the disclosure of health information when the contract is signed, so that the other parties to the contract may be able to obtain the necessary health information when needed, or third parties who are not covered by HIPAA could be entrusted with the determination of disability.

Conclusions

Like many new laws, the HIPAA privacy regulations are causing confusion and uncertainty. But contrary to the fears of many practitioners, durable powers of attorney that give the attorney-in-fact the power to make medical decisions should be honored under HIPAA and should allow the attorney-in-fact both access to protected health information and the power to authorize disclosures of protected health information. Other problems that practitioners may encounter should be solvable either with separate written authorizations for the disclosure of protected health information, with revised provisions in trusts and contractual agreements that recognize the problems of obtaining health information by reallocating burdens of proof and presumptions relating to health and competency, or by entrusting determinations of incapacity to third parties who are not health care providers restricted by the HIPAA privacy regulations.

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Joint Revocable Trusts: New Flexibility in an Old Form

By Beth A. Turner

Joint revocable trusts have been used historically as a mechanism for married persons to combine assets and control their disposition in a uniform manner. Estate planning attorneys in community property jurisdictions routinely have drafted joint revocable trusts to take advantage of the unique "double basis" benefit of community property on the death of the first spouse under Code § 1014(b)(6), which "steps up" the basis of the entire property, even though only one-half of the property is included in the predeceasing spouse's estate for estate tax purposes. In noncommunity property jurisdictions, joint revocable trusts are being used increasingly to facilitate full use of the federal applicable exclusion amount regardless of which spouse is the first to die, particularly when the combined assets of the marital unit exceed the federal applicable exclusion amount but the individual assets of one spouse or both spouses do not meet or exceed the federal applicable exclusion amount. In TAM 9308002, the taxpayers in a common law jurisdiction attempted to get a full "step-up" in basis, similar to the treatment received in community property. The IRS denied the full "step-up" in basis based on Code § 1014(e). Similar joint revocable trusts in common law jurisdictions were discussed in two private letter rulings, PLR 200210051 and PLR 200101021. Although the IRS maintains that Code § 1014(e) prevents a full "step-up" in basis, the joint trust has favorable results for funding a credit-shelter trust on the death of the first spouse to die. At a recent Philadelphia Estate Planning Council meeting, Professor Jeffrey N. Pennell commented that the IRS will most likely write a revenue ruling in the next two years giving more guidance in the area.

This article reviews the utility of a joint revocable trust that creates a credit shelter trust equal to the maximum federal applicable exclusion amount and a residuary marital trust for the balance on the death of the first spouse to die. It addresses a variety of gift, income, and estate tax issues and offers some practical drafting and administration advice. For a detailed analysis of a variety of other joint trust applications, see John H. Martin, The Joint Trust: Estate Planning in a New Environment, 39 Real Prop. Prob. & Tr. J. 275 (2004).

Terms of Sample Joint Revocable Trust

Although a myriad of provisions may be incorporated to customize a joint revocable trust, including variations on the general powers of appointment granted to the predeceasing spouse, for purposes of this article the following terms will be deemed to control the joint revocable trust (JRT). Husband and wife will be the sole grantors and sole co-trustees of the JRT. Each will contribute 50% of the assets to the JRT, consisting of property currently held as tenants by the entirety and individually. To equalize individually held assets, such as a marketable securities account, up to 50% of the asset will be transferred to the other spouse's individual name, and 50% of such asset will be held in each of two separate accounts, one in the name of each spouse, and then the husband and wife will contribute their equal separate accounts to the JRT. The JRT may be amended during the joint lifetime of the husband and wife only by unanimous consent. Each spouse, however, will be given the power to terminate the trust at any time before the death of the first of them to die and to have 50% of the JRT assets returned at that time to each spouse. During the joint lifetime of the husband and wife, the trustees will be authorized to distribute income and principal to either or both of the grantors in the trustees' sole discretion or as directed by an instrument executed by both of the grantors.

On the death of the first spouse (the "predeceasing spouse"), he or she will have a general testamentary power of appointment over the entire JRT assets allowing the predeceasing spouse to appoint the entire trust property to or among himself or herself, to his or her creditors, to his or her estate, or to the creditors of his or her estate. The trust becomes irrevocable on the death of the predeceasing spouse. A credit shelter trust (the "Family Trust") will be funded on the death of the surviving spouse with assets equal to the maximum federal applicable exclusion amount then in effect (currently $1.5 million, but scheduled to increase to $3.5 million by year 2009) based on a fractional formula (after taking into consideration any taxable lifetime gifts). The spouse who survives the predeceasing spouse (the "surviving spouse") will be the primary beneficiary and sole trustee of the Family Trust, and the children of the grantors will be secondary beneficiaries of the Family Trust. Distributions from the Family Trust will be limited to an ascertainable standard (health, support, maintenance, and education, for example). On the death of the surviving spouse, he or she will have a limited power of appointment over the remaining Family Trust assets and may appoint the remaining trust assets to or among the common descendants of the original grantors. Any Family Trust property not so appointed by the surviving spouse will be distributed outright to the common descendants of the initial grantors who are then living, per stirpes. It should be noted that this JRT could be drafted to incorporate trusts for children and generation-skipping transfer tax trusts.

The balance of the JRT assets not used to fund the Family Trust will be held in a marital trust for the sole benefit of the surviving spouse (the "Marital Trust") qualifying for the federal estate tax marital deduction. The surviving spouse will be the sole trustee of the Marital Trust. Income will be paid at least quarter-annually and principal will be payable in the trustee's discretion. The surviving spouse will have a testamentary general power of appointment over the Marital Trust assets. Again, any Marital Trust property not so appointed by the surviving spouse will be distributed outright to the common descendants of the initial grantors who are then living, per stirpes.

Gift Tax Issues on Funding and Until Death of Predeceasing Spouse

Treas. Reg. § 25.2511-2(b) provides that a gift is complete as to any property, or part therein, of which the donor has so parted with dominion and control as to leave him or her no power to change its disposition, whether for his or her own benefit or for the benefit of another. Treas. Reg. § 25.2511-2(c), however, provides that no gift is complete when a donor reserves the power to revest the beneficial title to the property to himself or herself. Under the sample JRT, because each grantor retains the power to terminate the JRT and have 50% of the JRT assets returned to each spouse, there is no completed gift on funding of the JRT by either spouse.

Until the death of the predeceasing spouse, any distribution from the JRT, including the distribution of the JRT assets on the termination of the trust, will result in a completed gift from the nonrecipient spouse to the recipient spouse to the extent that the property received in the distribution was not property contributed to the trust by the recipient spouse. The gift will, however, qualify for the gift tax marital deduction under Code § 2523.

Gift and Estate Tax Issues on Death of Predeceasing Spouse

The trust becomes irrevocable on the death of the predeceasing spouse. Under both previously cited private letter rulings, immediately preceding the death of the predeceasing spouse there is a completed gift from the surviving spouse to the predeceasing spouse of all of the JRT property that is eligible for the gift tax marital deduction. This deemed gift is relevant as it is essential that the predeceasing spouse be the transferor of all assets used to fund the Family Trust to counter any assertion that the surviving spouse was a transferor of such assets, thus causing inclusion of the assets in the surviving spouse's estate on his or her subsequent death. Furthermore, transfers from the Family Trust to beneficiaries other than the surviving spouse (children and grandchildren, for example) will not be deemed to be gifts from the surviving spouse to such other beneficiaries. Finally, the Family Trust assets will not be included in the surviving spouse's gross estate provided that a prohibited interest is not retained by the surviving spouse in the Family Trust (the surviving spouse will not be given a general power of appointment over the Family Trust assets and distributions to the surviving spouse will be limited by an ascertainable standard).

For estate tax purposes, the entire value of the JRT assets are included in the gross estate of the predeceasing spouse under Code § § 2038 and 2041. Code § 2038(a) provides in part that the value of the gross estate of a decedent includes the value of all property of which the decedent at any time has made a transfer (except in the case of a bona fide sale for adequate and full consideration) when the enjoyment thereof was subject at the date of death of the decedent to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate the interest or when the decedent has transferred such power within three years of his or her death. Under the sample JRT, each spouse is given the power to terminate the trust at any time before the death of the first of them to die and to have 50% of the JRT assets returned to each spouse. As a result, 50% of the assets will be pulled into the estate of the predeceasing spouse under Code § 2038.

The balance of the JRT assets will be included in the gross estate of the predeceasing spouse under Code § 2041, which provides that the value of the gross estate will include the value of all property to which the decedent possesses, at the time of death, a general power of appointment. Under the sample JRT, the predeceasing spouse is given the power to appoint the JRT assets to or among himself or herself, to his or her creditors, to his or her estate, or to the creditors of his or her estate. Therefore, any assets not already included under Code § 2038 will be included in the gross estate of the predeceasing spouse under the general power of appointment provisions contained in Code § 2041.

Income Tax Consequences

Code § 1014(a) provides that the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent is the fair market value of the property at the date of the decedent's death (or alternate valuation date). The "step-up" in basis under Code § 1014(a) is disallowed, however, under Code § 1014(e), if appreciated property is acquired by the decedent by gift during the one-year period before the decedent's death and the property is acquired from the decedent by, or passes from the decedent to, the donor of such property. Under such scenario, the basis in the hands of the original donor is the adjusted basis of the property in the hands of the decedent immediately before the death of the decedent.

Under the terms of the JRT, the surviving spouse is deemed to make a gift of all assets to the predeceasing spouse immediately before the death of the predeceasing spouse. Therefore, only the assets contributed by the predeceasing spouse to the JRT are eligible for a basis step-up under Code § 1014(a), as the assets contributed to the JRT by the surviving spouse were not the result of a completed gift within the one-year period ending one year before the predeceasing spouse's death. Although PLR 200210051 and PLR 200101021 specifically do not address the issue of asset tracing, as a practical matter, to ensure proper step-up in basis of the assets of the predeceasing spouse, it is imperative that the origin of the assets to the JRT on funding be ascertainable. As suggested above, to the extent possible, each grantor should contribute 50% of each of the assets to the JRT. Otherwise, tracing the origins of the assets could be administratively burdensome to ensure that the maximum amount of step-up in basis is achieved on the death of the predeceasing spouse.

Although some commentators have dismissed the utility of the joint revocable trust based on the disallowance of a full step-up in basis for all of the trust assets, as occurs in community property jurisdictions, the grantors are in no worse position for having contributed the assets to a joint revocable trust as opposed to a traditional trust because, according to the previously cited private letter rulings, the permissible step-up in basis is limited to assets deemed to be held in the individual's sole name. A more aggressive stance, not substantiated by the private letter rulings, would be that all of the assets used to fund the Family Trust receive a step-up in basis on the death of the predeceasing spouse, because the assets subject to the general power of appointment of the predeceasing spouse are not returned outright to the surviving spouse but instead are held in trust for the benefit of the surviving spouse and/or descendants and the distribution of such assets is subject to an ascertainable standard.

Drafting Considerations

Although the joint revocable trust technique may not be appropriate for all clients, a great deal of flexibility can be incorporated into the trust document itself to accommodate the unique facts and circumstances of many clients.

Depending on marital accord or discord, as the case may be, a joint revocable trust for tax planning purposes may be formulated granting either extremely broad or extremely narrow testamentary general powers of appointment. The Marital Trust either can be restrictive in nature or eliminated altogether by providing that assets not used to fund the Family Trust will be distributed outright to the surviving spouse. In addition, when it is desirable, successive trusts for children and/or generation-skipping transfer tax trust provisions can be easily incorporated into the overall plan. Finally, when assets were acquired in both community property jurisdictions and noncommunity property jurisdictions, it is important that the joint revocable trust be drafted to preserve the integrity of the community property assets and that such assets be identifiable.

Conclusion

The joint revocable trust is an effective tool for ensuring that the maximum federal applicable exclusion amount is used on the death of the predeceasing spouse while offering a gamut of optional language to accommodate the unique circumstances of any particular married couple. This technique should, however, be reserved for well-advised clients who have examined all of the estate, gift, and income tax implications.

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Family Law

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Business Valuation Standards
What Do They Mean to You?

By Robert E. Schlegel and Chris Hines

Why should a matrimonial attorney pay attention to business valuation standards? Quite simply, because your knowledge can yield big judgment dividends by supporting your valuation expert or by impeaching the credibility of the opposing expert.

Observance of professional standards distinguishes an expert opinion from fact testimony. Not all standards are applicable to every appraiser, yet quite often two or more sets are applicable to an individual expert who is multi-credentialed or touts membership (even candidacy for a designation) in several organizations. Adherence to standards implies an expert analysis that is diligent, reliable, and verifiable with accepted professional procedures: experts who follow recognized standards are far less likely to fall victim to Daubert challenges. Conversely, experts who fail to perform work in accordance with recognized standards are subject to criticism and may have their credibility impugned by sharp opposing counsel.

Professional Organizations

In 2005, business valuation experts in the United States are likely to be members of -- or received education from -- one of four professional organizations: The American Society of Appraisers (ASA), the Institute of Business Appraisers (IBA), the National Association of Certified Valuation Analysts (NACVA), or the American Institute of Certified Public Accountants (AICPA). All of these organizations either have professional standards or are in the process of adopting standards that address ethics, competency, objectivity, accepted procedures to develop the business valuation opinion, and how to report the opinion. These standards are dynamic; periodic updates, revisions and exposure drafts of new language are being regularly promulgated.

Beyond pronouncements of ethics and due professional care, each of the standards above fundamentally addresses how an appraisal of equity assets is to be performed, and the various forms of reporting. "Development Standards" generally describe identification of the subject, consideration of approaches and methods of analysis, application of premiums and discounts, support for the opinion, and requirements to maintain proper files and work papers substantiating the opinion. "Reporting Standards" generally outline the different varieties of written or oral communication that are acceptable. Several of the standards indicate that in litigation settings, reporting formats may be specified by legal counsel, thereby permitting a departure from noted standards. Any loosening of the reporting standards for litigation purposes, however, does not loosen the developmental standards for doing the analysis or keeping records to support the analysis. Standards promulgated by the AICPA have been in various drafts over the past 3 years, but should be formally released for final "exposure" in the coming months with formal adoption of the requirements anticipated later this year or in 2006. All of the organizations seem to be moving toward common definition of certain terms. The current International Glossary of Business Valuation Terms can be found at www.bvappraisers.org/glossary/glossary.pdf.

Other Professional Standards

In addition to the four organizations above, attorneys may also see reference to four other sets of professional standards that address business valuation analysis directly or indirectly.

Uniform Standards of Professional Appraisal Practice (USPAP)

These are standards originally developed in 1987 by the Appraisal Foundation (and continually updated; see www.appraisalfoundation.org) as a response to real estate valuation needs from the Savings & Loan debacles in the 1980s. USPAP Standard 9 addresses how to do business valuation work. Standard 10 addresses how to report business valuation work. There are also two trailing sections in USPAP -- "Statements" have the same impact and requirements for practice; "Advisory Opinions" are simply illustrations of specific situations without the weight of Standards. Members of the ASA must conform to USPAP; however, members of IBA, NACVA and the AICPA are not required to conform to USPAP. As the first released standards for business appraisers, USPAP has set the tone that others generally follow.

Chartered Financial Analyst Institute

This Institute (see www.cfainstitute.orgwww.cfainstitute.org) has a code of ethics and standards of professional conduct. CFAs normally opine on investment strategies and are commonly employed by banks and financial management firms, but do serve as experts in business valuation.

The Internal Revenue Service (IRS)

For a copy of the IRS guidelines, see www.bvresources.com/FreeDownloads/irs-guidelines.pdf. The IRS has recently published appraisal standards for internal use and work by their outside appraisers. Conceivably, reference to these standards would only surface in matrimonial issues with extreme tax consequences.

International Business Valuation Standards

These come from the International Valuation Standards Committee (see www.ivsc.org/pubs), and are the least likely to arise in matrimonial settings unless equity assets are being appraised with extensive international connotations with business valuation opinions from foreign appraisal professionals.

What Should a Matrimonial Attorney Do?

When presented with an equity asset issue, the response of most attorneys is to hire an expert, who is an accountant or an otherwise credentialed analyst, to quickly form an opinion. Opposing parties usually do the same, with too often the result of a wide gap in opined value between two dueling experts. Your understanding of the experts' professional standards early in the process can help to avoid this problem, with more efficient use of the clients' resources and a higher quality division of assets.

In hiring your own business valuation expert, first determine if the expert is a member of one or more of the professional organizations. Go the appropriate organization's Web site; check your expert's claimed credentials, and download the current version of standards.

- Inquire as to the "level of service" to be provided.

- Based on preliminary information you have shared with the expert, ask if there are any anticipated qualifications to the opinion.

- Clarify the reporting desired -- oral advisory, some form of written correspondence, and/or formal testimony.

- Ascertain if the expert has any hesitation of competence to undertake the assignment, and how he or she plans to overcome those issues if you are presented with an opposing expert who appears to have presented less than competent work.

- Establish the professional standards under which the work was performed. If the expert is a member of multiple organizations, multiple standards may apply. In this case, the expert may be bound by the highest, or most acute, level of work or reporting, not the lowest.

- Research both the level of analysis undertaken and the reporting of the opinion. Caveats such as calculation, consulting, preliminary findings, or limited opinion are tip-offs that you do not have a full appraisal or unambiguous opinion of value. Ask why!

- Clarify any difference between the standards and the opposing expert's analysis with your own (or separately engaged) business valuation expert. Interpretations of minimum standards given materiality, financial comparison, and common valuation practice are necessary. Remember that the glass of water may be half full or half empty depending on perspective.

- Position the most egregious differences in deposition.

- Have fun in mediation or cross-examination.

Concluding Thoughts

Business valuation professionals are continuing to grope with the development of ethical and work standards through a variety of organizations. These are dynamic, with periodic updates to the wording. Whether a given expert analysis meets or fails to meet the threshold of professional and competent work is a finding of an additional expert opinion rather than a finding of fact. Work with your own expert to provide you with an education of the current progress of standards. In high dollar equity asset matters, your knowledge of what to expect in terms of good expert work and poor expert work should yield the benefits of a compelling presentation.

Organization	Web Site	Written Standards?	Required Adherence?
ASA	www.appraisers.org	Yes	Yes
IBA	www.go-iba.org	Yes	Yes
NACVA	www.nacva.com	Yes	Yes
AICPA	www.aicpa.org	Yes (in draft)	Pending (late 2005/ early 2006)

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Domestic Asset Protection Trusts: An Alternative to Prenuptial Agreements

By Kalimah Z. White, Esq.

Divorce is a cruel reality in this day and age. More than half of the marriages in the U.S. end in divorce. In the absence of proper planning, a spouse in a dissolving marriage may be entitled to an equitable distribution of marital property, which includes business interests, gifts, inheritances, employment income and other assets held prior to the marriage. Thus, it is imperative for couples contemplating marriage to find ways to clearly delineate their wishes with regard to their income and assets prior to the "big day". If not, such decisions may be left to the wide discretion of judges and the court system.

As such, in past years, both men and women concerned about protecting assets obtained prior to the marriage from future spouses use prenuptial agreements. Although prenups serve a certain purpose, there are many personal and legal issues that deter couples from executing prenups. First, due to the stringent validity requirements of prenuptial agreements, these agreements must be drafted very carefully. If not done correctly, prenuptial agreements are open to challenges and may be held invalid. Each party must be represented by independent counsel to avoid any accusations of duress or coercion. Also, the agreement must be fair at the time of execution and enforcement, which, in most instances, the "fairness" of the document is determined by a judge or a jury. Depending on the state, anywhere from 10% to 80% are completely disregarded in a divorce proceeding. Second, asking one's future spouse to enter into a prenuptial agreement may cause difficulty in some blossoming relationships. Many people erroneously believe that executing a prenup means that they do not trust their future spouse or expect to be divorced. As such, many couples shy away from such agreements. Lastly, the requirement of full financial disclosure also can deter couples from executing a prenup. Although couples promise to share their lives together upon marriage, many feel uncomfortable sharing their total net worth.

Due to the issues and problems surrounding prenuptial agreements, many practitioners have turned to alternatives to protecting assets obtained prior to marriage, such as a domestic or foreign asset protection trust. However, due to the mounting costs of establishing and administering foreign asset protection trusts—coupled with the fact that clients are uncomfortable with sending their assets offshore-- utilizing a domestic asset protection trust in a state, such as Delaware, that permits self-settled trust has become a much more popular vehicle for protecting one's assets from a future spouse.

Domestic asset protection trusts (DAPTs) are trusts that protect assets from creditors, which include by definition a future spouse. Additionally, a DAPT allows the settlor to name him or herself as a potential beneficiary—hence the name "self-settled" trusts. Beyond its utility as an estate planning device, asset protection trusts are effective against a settlor's future spouse and other creditors provided the trust settlement does not violate applicable fraudulent transfer law. Furthermore, in establishing a domestic asset protection trust, there is no requirement that the settlor of the trust disclose his or her plans to create a DAPT or the assets with which he or she will fund the trust. As such, a soon to be married individual can establish a DAPT in a state permitting such trusts and, upon the dissolution of the marriage, shield those assets from any equitable distribution. This technique is very appealing to many individuals who, although would like to protect their assets from their future spouse or the widely unpredictable discretion of a judge, would like to do so quietly and without any hassle.

As with any estate planning technique, a domestic asset protection trust, although relatively easy to establish, must meet certain criteria to be valid. A DAPT: 1) must be irrevocable or unchangeable; 2) should appoint a trustee with the discretion to administer the trust; and 3) must appoint a trustee, whether corporate or individual, that is a resident of the jurisdiction in which the trust is formed. Additionally, a DAPT must contain a spendthrift clause, which restricts the transferability of a beneficiary's interests in the trust property, whether voluntary or involuntary, before the trustee actually distributes the property to the beneficiary. However, in exchange for restricting the use of their assets, those who establish DAPTs receive several benefits. First, because the assets placed in the DAPT may be viewed as the property of the trust, the settlor may protect those assets against claims made by future creditors, including a future spouse. Additionally, unlike jurisdictions without asset protection statutes, a grantor may create a self-settled trust, which permits a grantor to retain a beneficial interest in the trust while protecting the assets from future creditors. Thus, a potential wife or husband can establish a domestic asset protection trust that is fully discretionary, receive financial benefit from the trust as needed during the life of the trust **and** protect those assets from a marriage that came after the creation of the trust.

With such power and protection afforded by DAPTS, practitioners and advisors are remiss if they do not raise the subject of these trusts with their clients when discussing premarital planning. If the subject of a DAPT is not raised, an advisor runs the risk of having a client's prenuptial agreement held invalid or the possibility of a client losing his or her future spouse to the "You Don't Trust Me" argument. Alternatively, DAPTs can be a safe and less invasive way to protect a client's assets, while at the same time preserving the trust and love all clients desire when contemplating tying the knot.

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The Benefits and Pitfalls of Representing Nontraditional Clients in Family Law, Estate and Civil Matters

By Thomas H. Prol

In the last decade there has been a great deal of attention given in the media to same-sex couples and their families. For new and established lawyers trying to develop business and make new law, representing gay and lesbian couples can be an exciting area on a new legal frontier.

According to the 2000 census, 601,209 same-sex couples were reported to live in the United States and Puerto Rico.[1] That number is likely higher as it is an extrapolation of a sample of people who were comfortable informing a stranger knocking on their door that they are gay or lesbian.

For some family law, estate and civil attorneys, these couples and the relatively new practice area that has grown up around their legal needs represents a great opportunity to serve an underserved group of new clients. Working in a growing legal market with forecasts for increasing consumer demand has many benefits. However, the pragmatic practitioner must realize that, as with any area of law that is undergoing significant growth and change, representing same-sex couples and their families is not without its pitfalls.

In years past, same-sex couples may have sought out a gay or lesbian attorney to handle their family, estate and civil matters. They did so under the belief that these attorneys could better understand their personal situation, uphold their confidences and would avoid judging the relationship outside of what was legally necessary. However, as society has become more accepting and open to gays and lesbians, these couples have stepped into the general legal marketplace and now seek out attorneys who are best suited to their specific legal need, regardless of the attorney's sexual orientation.

If you plan to take your practice into this field, you should take a primer on the history of gay and lesbian civil rights litigation in the US and elsewhere, beyond what you may have learned in law school. There are a number of federal cases, laws and issues of which you should be aware, as well as researching your local jurisdiction.

- *Bowers v. Hardwick* 478 U.S. 186 (1986) *rev'd. by Lawrence v. Texas* 539 US 558 (2003) (holding sodomy is not a Constitutional right)
- *Romer v. Evans* 517 U.S. 620 (1996) (Colorado's constitutional Amendment 2, barring local protections for gays and lesbians, violates Equal Protection)
- *Dale v. Boy Scouts* 530 U.S. 640 (2000) (holding that New Jersey's discrimination protection in "public accommodation" conflicts with the Boy Scouts' First Amendment expressive association rights)
- *Lawrence v. Texas* 539 U.S. 558 (2003) (reversing *Bowers* and holding that a Texas law criminalizing sodomy violates the Due Process Clause).

Be aware that there are other cases that provide insight into federal Constitutional jurisprudence on same-sex relationship issues such as *Loving v. Virginia* 388 US 1 (1967) and *Griswold v. Connecticut* 381 US 479 (1965) , as well as laws and cases in your jurisdiction dealing with contract-based claims under meretricious relationships[2] and the statutory constructs that define same-sex relationships in some states and cities.

Importantly, the 1996 Defense (or Denial, depending on your perspective) of Marriage Act (DOMA) that was passed by Congress and signed by President Clinton, defines marriages under federal laws as between a man and a woman only. DOMA bars same-sex couples from the 1,161 federal marital rights and benefits that are granted upon marriage[3] and allows states to refuse recognition of other jurisdictions' same-sex marriages under the Constitution's Full Faith and Credit Clause.[4] Forty-two states have adopted state-level DOMA-like laws or constitutional amendments, most of which declare same-sex marriage to be against the state's "public policy."

DOMA has yet to be fully tested in the courts and the constitutionality of DOMA remains in question. Indeed, you may find in much of your practice that the law is simply not clear on an issue or result your client wishes to achieve. Thus, you should prepare to advocate vigorously for your clients' wishes and approach their needs with creative lawyering. Some examples of creative lawyering include alimony or *pendente lite* support under both statutory and contract theories for clients upon termination of their same-sex relationships; making a loss of consortium claim or seeking wrongful death standing; and, child support based on theories of putative or psychological parenthood.

Be aware of the status of the various legislative inventions that define same-sex relationships as well as the wildly variant rights and benefits governments give to people in them. A good rule of thumb is to know that civil same-sex marriage is equivalent to marriage; civil unions are designed to mirror marriage (without the word “marriage” and without granting any federal marriage rights)’ and “reciprocal beneficiary relationships” and “domestic partnerships” are not even close to marriage or even “marriage lite.” The latter categories generally provide only a handful of the hundreds of rights that come to a couple who marries under states’ laws.

For example, Massachusetts residents are able to have a same-sex marriage with all the same rights and benefits as opposite sex couples, though the federal DOMA appears to bar any federal marriage benefits, such as immigration and social security. As an another example, Vermonters have civil unions which are almost exactly the same as marriage within state borders, but do not include standing as a spouse under the US laws or those of other states. Hawai’i residents can enter into reciprocal beneficiary relationships while New Jersey and California residents can join in Domestic Partnerships. In New Jersey, though, a domestic partnership provides only six of over 800+ rights that a married couple has and absolutely no federal rights.

Some other helpful hints:

Leave your personal views at the door. If you have a religious or other objection to gay and lesbian relationships, this is probably a practice area of which you should steer clear. If your personal objection impacts the quality or depth of your legal work for your client, you likely have a responsibility under your state’s Rules of Professional Conduct to avoid that representation.

Know the language. Words such as “homosexual” or “gay lifestyle,” while seemingly innocuous could be offensive to your client. Have your office staff use phrases such as “partner” and other language that your client uses. And don’t be afraid to ask what makes them comfortable.

Know the core terms and definitions of statutory non-marriage relationships from state to state and, even, from city to city. Two good sources are http://www.hrc.org/ and http://www.lambdalegal.org/. Also, check with your local or state bar for a gay and lesbian rights committee if it exists.

Treat the gay or lesbian client just like you would any other client. It should not come as a surprise to you that the issues of concern to gay parents are remarkably similar to those of a non-gay parent. The trick is understanding the status of the law and, where necessary, applying creative lawyering to help your client achieve their desired result.

Be frank about the limits of the law with your client. Know that the laws of many states and the U.S. may work against your client and try to help them avoid problems. Gay men and lesbians understand discrimination well and will appreciate your being frank about what cannot or probably cannot be done under the law.

Recognize when you cannot represent both members of a couple. If you are drafting a domestic partnership agreement or a pre- or ante-nuptial contract, for example, you may need to recognize that each person needs separate counsel, particularly if there is a disparity in bargaining power or other complications.

Your retainer agreement or a separate, signed letter should include an acknowledgement by your client of the transitions in a particular area of law and the possibility that the domestic partnership agreement, Last Will, judgment, custody order or the like that you are seeking may not survive across a state line or on appeal, for that matter. For example, a custody or visitation award to one same-sex partner arising from a Vermont Civil Union may be ignored or dishonored in Virginia where that state declines to recognize such relationships or the judgments and decrees of other states arising out of same-sex relationships. Your malpractice insurer will thank you for a carefully worded statement. Your client will thank you for being honest and preparing them.

Being a family law, estate or civil attorney in this area of law can be difficult, but rewarding. If you stay on the cutting edge of this changing field of law, you can have a successful practice and serve clients who truly need the help of legal counsel as they try to protect themselves and their families.

Thomas H. Prol, is co-chair of the NJ State Bar Association's GLBT Rights Committee. He can be reached at thomas@prol.net. This article reflects his own opinions and is not legal advice.

United States Census Bureau, 2000 Census. See also http://www.gaydemographics.org/USA/USA.htm (last visited December 14, 2005).

See, e.g., *Koslowski v. Koslowski*, 64 N.J. Super 162, 395 A2d. 913 (Ch.Div.

1978) *aff'd*. 80 N.J. 378, 403 A2d. 698 (1979) .

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When Silver and Golden Year Tarnish
Divorce Involving the Older Client: The Key Issues

By Jennifer J. Rose

No longer the domain of the young and reproductive, divorce increasingly involves the older client whose 50-year marriage may have reached its breaking point or whose third marriage simply didn't work out. While some May-December marriages may have produced progeny, divorce among older partners seldom generates child custody disputes. Instead, issues of property, spousal support, taxes, family gifts and rifts and providing for those golden years become paramount.

The Initial Interview. The initial contact with the older matrimonial client differs from the first brush with many younger and middle-aged litigants. "I can't believe that he's leaving me after all these years of saving for our retirement" replaces the standard battle call of "She won't let me have the children for Christmas." Frequently, the older client perceives less urgency with the divorce process than does the younger client.

While many older clients often are more organized than their juniors in presenting information to counsel at the initial interview, take the time to assess the client's cognitive skills. Consider whether the client understands the process and if there are any visual, auditory or physical deficits to accommodate.

Crippling long-term health care expenses and Medicare eligibility may be the incentive for ending some elderly clients' marriages. Familiarize yourself with the Medicare Catastrophic Coverage Act of 1988 and its legislative progeny. Consultation of elder law resources for honing eligibility is essential.

Allow the older client plenty of time to consider options. A marriage 40 years in the making may not unravel itself as quickly as a short-term marriage; on the other hand, the parties may have spent the past 39 years of that long-term marriage working out the details of its demise. Divorce may not be the sole remedy - a simple separation, separate maintenance action or even an annulment in the case of a very short-term remarriage may be more advantageous to both parties.

The Family Dynamics. It is particularly important to consider the family dynamics in the case of an older client. Even though grown children may have flown the roost, it's not unusual to face an irate son or daughter whose motivations may be less driven by filial devotion than by self-interest. The adult child's interest in family business enterprises may be at risk. Parental largess extended to grown children may come to a screeching halt when each parent faces life with only half of the marital estate. Furthermore, the children may perceive that additional caretaking chores for a dependent parent may fall upon them if the able-bodied spouse has departed from the family home.

An adult stepchild's animosity toward a parent's partner may be exacerbated when a serial marriage turns sour; or, the disgruntled stepchild may be the moving force behind the breakup in an effort to preserve parental wealth that might be transmitted to a stepparent. The adult stepchild may have already taken steps to "protect" his or her parent, subverting the stepparent's property rights, redirecting a parent's assets to the child, accepting a power of attorney from the parent or becoming the parent's guardian or conservator. In these cases, it almost seems as if there are three parties to the marriage: husband, wife and stepchild.

The Competence of the Parties. Consideration should be given to the parties' competence to defend and whether a guardian ad litem should be appointed to protect the interests of one or both of the parties.

Property Issues. Property issues in the divorce of an older client take on a different hue. Frequently, younger and middle-aged clients simply haven't amassed as much property as their elders, and their premarital property is often easier to identify. By the time a long-term marriage crumbles, however, it's not unusual for neither party to recall what he or she brought into the marriage, where that property is now or what happened to it. In many cases, premarital assets have been scattered to the winds, depleted, completely subsumed into the marital estate, transferred to the children or others, or are no longer even a concern.

Inherited Property. Inherited property becomes more of an issue in the elder divorce. By the time many long-term marriages have hit the rocky shoals, the parties have already come into an inheritance. In such cases, the following issues should be considered:

- Can either party readily identify the inherited property?

- Which party inherited it?

- Where is that inheritance now?

- Has the inherited property been transmuted or commingled with marital property, losing its special status?

- Was the bequest simply spent on family expenses or a trip to Europe?

- Did the inheritance provide an income stream upon which the parties depend?

- Are there special circumstances that would justify not setting off an inheritance to one party?

Gifts. Less frequently at issue are gifts received by either party, except, of course, in the case of interspousal gifts. Age diminishes the likelihood of receiving substantial gifts from third parties. However, transfers from the marital estate to others becomes a more important issue. Consider :

- Were gifts made to the children on a regular basis, or did one party make gifts to the children or to others in contemplation of divorce?

- What pre- divorce planning has one party undertaken to the other's detriment?

- Are there investments in illiquid real estate or appraisal-defying other assets?

- Have marital assets been encumbered in an effort to frustrate property distribution?

Spousal Support. Spousal support may assume greater importance among older clients. In some cases, the notion of rehabilitative alimony simply doesn't work; age may have dimmed reasonable expectations for retooling and development of marketable job skills. The duration of one spouse's earning power and the other's need for support may come into conflict. Age and infirmity bode support needs for both spouses.

Termination or reduction of alimony carries weightier connotations for the older client than it might for the younger or middle-aged one. The following issues should be addressed:

- Should alimony terminate upon retirement, upon receipt of retirement benefits or upon death of the payor?

- On the other hand, should a scheme be created to provide for its continuation past the payor's death?

- If so, how might that income stream be assured - through life insurance, disability insurance, a QDRO?

Retirement Benefits. What kind of retirement benefits do the parties have? Most obvious is social security. The Social Security Administration's "Request for Earnings and Benefits Estimate Statement" will show the number of credits earned, the earnings record and an estimate of benefits.

If the parties currently receive social security benefits, assess the impact of divorce upon the benefits payable. Railroad retirement, state and federal governments, the U.S. Postal Service, the foreign services and the military all operate under unique sets of rules.

Consider also the following:

- Has the marriage endured the requisite decade to qualify the non-employee spouse for benefits under the mate's earnings record?

- Or, does the non-employee spouse have sufficient credits in his or her own account?

- What other retirement plans do the parties have, e.g., private pensions, qualified or unqualified under ERISA, defined contribution, defined benefit, Keogh or IRAs?

- Is the retirement plan the most valuable or a substantial part of the marital estate, or is it balanced by equivalent assets?

- Have the parties already opted for distributions from retirement plans?

Health Insurance. Health insurance may loom with greater urgency among the elderly. COBRA may not be the safety net many assume. Specifically excluded from COBRA's reach are government and employers with less than twenty employees, although state plans may provide more or less generous treatment. Former spouses of military personnel confront even more variants. Furthermore, the 36-month COBRA umbrella snaps shut when the beneficiary becomes eligible for Medicare. Who's going to pay for supplemental insurance? And what about long-term health care and disability insurance?

Taxes. Taxes present yet additional conundrums in the older client's divorce. The most obvious - the exclusion of gain from the sale of a principal residence (as recently amended and discussed in the article on page 5) - punctuates the award of the marital residence as well as the timing of its sale. The basis in property creates additional considerations in making its award. Consider the following tax-related issues as well:

- How will alimony shade each party's tax picture?

- What tax consequences lurk behind retirement plans and distributions?

- How will recapture distort the parties' income?

- Finally, the history of the parties' tax lives raises issues of unpaid taxes, liens and the innocent spouse doctrine.

Estate Planning. Serious estate planning often works at cross-purposes with effective divorce planning. Those clever steps intended to shield property from the clutches of the tax collector and creditors may have positioned the same worldly goods in the other spouse's hands. The irrevocable trust may have already set the stage for property distribution. The parties' interest and control in their property may have become fragmented for reasons of convenience as children become signatories on accounts, joint ownership develops, intentionally or inadvertently, conditional gifts are made or life estates are created. Even a simple power of attorney can tweak the best-laid plans. In addition, consider:

- Has the client granted the spouse a durable health care power of attorney or designated the other as a standby guardian or conservator?

- And, finally, what about those two side-by-side cemetery plots?

Bearing little resemblance to the garden variety divorce involving custody, child support and college education among the pre-AARP client, the geriatric divorce calls upon a broad range of practice skills.

Jennifer J. Rose, editor-in-chief of THe Compleat Lawyer, is an attorney now living in Morelia, Michoacan, Mexico.

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ADR Cost
Getting Paid: What You Need to Know About Neutrals' Compensation

By David Plimpton

AMS -- Arbitration, Mediation, Settlement or other forms of Alternative Dispute Resolution

This article attempts to highlight in checklist form key compensation and expense issues worth considering by mediators, arbitrators and other neutrals as they establish and carry on a neutral's professional practice.

Discussed below are factors relating to (a) fees and income and (b) costs and expenses. Costs and expenses are usually measured both in terms of money and time--administrative, training, networking, etc. While some of the issues will be familiar to attorneys who manage a law practice, many are unique--or at least different--for the practicing neutral. Several of the issues mentioned appear in more than one of the categories below because they may come up for the neutral in more than one setting.

These issues arise principally in three separate contexts of neutral practice:

(1) Private service as a neutral, where the neutral works directly with the parties and administers the neutral proceeding without any involvement of a provider organization. For purposes of this article, "provider organization" includes governmental bodies that administer alternative dispute resolution programs and/or have neutrals' rosters.

(2) A provider organization, at the parties' request, arranges for the neutral from its roster. After the neutral is appointed, he or she administers the proceeding, and bills and collects for the neutral's fees, working directly with the parties.

Examples include Alternatives' publisher, the CPR Institute, and many court ADR programs.

(3) A provider organization provides the neutral at the parties' request, administers the neutral proceeding, and collects and remits the neutral's fees. The neutral's primary role is to conduct and complete the neutral proceeding. Examples include the American Arbitration Association, the National Association of Securities Dealers Dispute Resolution, the New York Stock Exchange, Minneapolis-based National Arbitration Forum, and many governmental bodies.

There are hybrids of situations (2) and (3). This article will attempt to point out the differing implications of these separate situations.

A list of upfront and periodic time requirements and costs that usually are incurred in order to meet criteria and qualifications to be able to serve as a neutral, to be in the best position to be chosen to serve as a neutral, and to carry on a professional neutral practice.

a. Marketing/advertising--initially and periodically after the neutral practice is established.

b. Training, initial and periodic. This is particularly relevant for work with provider organizations.

c. Roster/membership fees of provider organizations--initial and periodic.

d. Office and administrative costs.

e. Networking, cultivation, and professional neutral organization efforts, including those professional organizations that are not also provider organizations, such as the Association for Conflict Resolution, the American Bar Association, state bar associations, and arbitrator and mediator professional organizations.

f. Discussion of possible dispute resolution processes with parties or counsel considering using dispute resolution, and providing information on the neutral's qualifications to serve in specific disputes.

g. Preparation and negotiation of mediation, arbitration, confidentiality and neutral compensation agreements.

h. Whether work is via private practice or through a provider organization, there is time and effort in assessing and protecting the likelihood of receiving enough cases to recoup the more-direct time and costs above.

i. Conversely, what commitments of time and availability does the provider organization expect in return for a roster listing?

Fees, specifically: The manner and amount of compensation.

a. Hourly fees--For what time will the neutral be compensated? Work can include discussion of the dispute resolution process; drafting and negotiation of mediation, arbitration, confidentiality, and neutral compensation agreements; study and preparation; meetings; conferences; sessions; review of submissions and evidence; deliberation; writing, including memorandums, orders, summaries, court reports, decisions, and correspondence; telephone calls; research; travel, and administrative tasks. How should neutral hourly rates be set? Factors include the neutral's experience and eminence; comparable rates in the professional community; rates for legal practice, and whether any of the fees have to be shared with a provider organization.

b. Fixed per case, proceeding or session--For what time will the neutral be compensated? Often, provider organizations pay neutrals per case, proceeding or session. If payment is per proceeding or session, other time, such as that discussed in hourly fees above, often is not compensated. Does the neutral share provider fees? Who pays the provider fees? What are the implications for the neutral, ethically or otherwise? How do the fees compare, based on time expended, with what the neutral could charge on an hourly basis for other neutral or professional work?

c. Per diem and/or half-day rates--Provider organizations often pay neutrals on this basis. Again, for what time may the neutral include in charges based upon these daily or one-half day rates, and how do these rates compare, based on time expended, with what the neutral could charge on an hourly basis for other neutral or professional work?

d. Mediator compensation is sometimes based partly or wholly upon a contingent fee arrangement, in which the neutral receives a percentage fee in the event the dispute settles in mediation. The percentage may be based upon some or all of the disputed amount. Ethical and disclosure issues may be raised by such an arrangement.

e. How are fees billed and collected? Is there a retainer, advance or a deposit?

Is all payment after service? Is there a risk of non-collection?

f. Can or should the neutral charge cancellation or postponement fees when there is a late postponement of the proceeding, or the case settles? Often, cancellation or postponement occurs after significant preparatory work by the neutral--and when it is no longer feasible for the neutral to schedule another proceeding in place of the postponed or canceled event.

g. Is some pro bono or reduced-fee work required of the neutral in return for roster listing by a provider organization?

h. If the provider organization is a governmental body, are there statutory or regulatory limits or guidelines on neutral compensation?

i. What out-of-pocket expenses can be part of the neutral's charges (e.g., postage, telephone tolls, photocopies, research, travel, and secretarial expenditures)? Some provider organizations may not allow expenses to be charged at all, or have guidelines or limits on the types and amounts of expenses to be paid by the provider organization or charged to the parties.

j. May the neutral use and charge for experts, associates or employees as part of the neutral's service? What are the ethical and disclosure implications for the delegation of neutral responsibilities and confidentiality of the process?

Arrangements for compensation.

a. Include contract provisions on fees and expenses, either as part of a mediation or arbitration agreement, or as a separate compensation agreement between the neutral and the parties. Even if there is no contract, the neutral should establish the fee arrangements and inform the parties in writing, including possible charges for experts, associates or employees.

b. Include initial deposits for estimated fees to avoid post-process payment or collection problems, even when there is a contract specifying fees and party or other responsibility.

c. Should the neutral make arrangements to look to counsel for the parties for payment of fees, as an alternative, or in addition, to contractual arrangements?

d. Special fee and expense arrangements in arbitration may be necessary where applicable law, a pre-dispute contract arbitration clause, or a post-dispute arbitration agreement contemplate arbitrator apportionment or assessment of arbitrator fees and expenses between the parties. If party deposits are made in such a case, should each party deposit the total multiparty deposit in the arbitrator's (or the tribunal chairman's) escrow account to facilitate the return of arbitrator fees and expenses to the prevailing party? Will interest be earned on such deposits? If so, who receives the interest? What disclosures should be made about interest--including Interest on Lawyer Trust Accounts (Iolta)?

e. Is court approval of fees necessary? Most often, this is an issue for court-appointed referees, special masters, and arbitrators.

f. For multi-member arbitration or mediation panels, with or without a party-appointed neutral: Should the chairman deal with the parties on billing matters for all panelists to avoid as much communication as possible between parties and arbitrators on compensation?

g. How are fees and expenses billed and collected? By the neutral or provider organization? Via retainer, advance or deposit? Are bills sent periodically? Or after completion of neutral services?

h. Other payment terms: Include the time period after conclusion of neutral services by which payment is due, and consider and specify whether interest can or should be charged on overdue amounts.

i. Who takes the risk of non-collection from parties: the neutral, the provider organization and/or the parties' attorneys? Can or should the neutral employ a collection agency or attorney to collect the fees? Can or should the neutral bring suit to collect fees? If an arbitration award has been appealed by the delinquent party, should the arbitrator hold off or suspend collection efforts until the appeal is finally resolved? If a settlement flowing from a mediation is being implemented against the delinquent party, should the mediator-- assuming he or she is aware of that fact--hold off or suspend collection efforts until the settlement is finally implemented?

* * *

Resources that may provide guidance to neutrals addressing some of the compensation issues raised in this article include the CPR-Georgetown Commission on Ethics and Standards in ADR--Principles for ADR Provider Organizations (2002); the CPR Model ADR Procedures & Practices (MAPP) Series; the CPR "Drafter's Deskbook for Dispute Resolution Clauses"; and "Commercial Arbitration at Its Best: Successful Strategies for Business Users," (ABA Book Publishing, 2001, published by the American Bar

Association Sections of Business Law and Dispute Resolution); the CPR-Georgetown Commission on Ethics and Standards in ADR Model Rule for the Lawyer as Third-Party Neutral (2002); CPR's Mediation Procedure; and CPR's Rules for Non-Administered Arbitration. Information for all is available at www.cpradr.org.

See also the new and revised AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (2004) (available at the American Arbitration Association's Web site, www.adr.org; click on Rules/Procedures on the home page, and then choose "Ethics and Standards").

David Plimpton, of Cape Elizabeth, Maine's Plimpton & Esposito, has conducted a neutral's practice since 1988. He has served as a mediator, arbitrator, court-appointed referee and special master in state and federal courts, and in other neutral capacities.

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Litigating On A Shoestring

By Randy B. Birch

You may wonder how in the world many of the cases with legitimate causes of action, but with lower damages, can be economically and efficiency pursued. Lawyers sometimes forget that to the average client, a few hundred dollars in damages is significant, and that a few thousand dollars in damages may be catastrophic. How do lawyers handle those cases, yet not go out of business themselves? I have heard that it is not uncommon for firms of any significant size to refuse to take cases without at least six figure damages.

While not the focus of this article, many pursue their claims in small claims courts. While the amounts and subject areas that may be handled are often limited, you can get a case to trial quickly and efficiently - often within 60-90 days. While some small claims courts may not like or even allow attorneys, most do, and either alone or with the assistance of their attorney, a client can get a case to trial.

Years ago litigation may have been trial by ambush. In theory, we are now more civilized, pursuing discovery and motions to limit the issues and otherwise sorting the wheat from the chaff. The problem with such practice is that it can be quite expensive for the client (or the attorney if taken on a contingency). Regardless of the size of the case, the time and energy (hence money) spent preparing a substantive motion can easily exceed $5,000.00. What if you only have $10,000 or $20,000 of damages in the case you are asked to try?

Thanks in substantial part to *Rule* 26, of the *Federal Rules of Procedure*, the substance of which are followed by many if not most states, it is possible to handle, relatively efficiently, cases that might at first glance seem too small to pursue.

Rule 26(f), *F.R.C.P.* provides that as soon as practicable and at least 21 days prior to the due date of the scheduling order (which per *Rule* 16(b) *F.R.C.P.* is within 90 days after the appearance of a defendant or 120 days after service), the parties are to confer to consider the nature and basis of their claims and defenses, the possibilities for a prompt settlement or resolution of the case, and to develop a proposed discovery plan. Unfortunately, the "planning meeting" is often done by telephone, if at all, and a stipulation is put together by one of the parties with the default dates and time periods proscribed by the local rules. The parties' counsel should, but often do not, take the opportunity to discuss the respective positions of the parties and the merits of the case.

A key requirement of the planning meeting is that the parties provide the initial disclosures as are required by *Rule* 26(a)(1). The parties are to disclose, without the need for discovery, 1) the identity of everyone likely to have discoverable information; 2) a copy or description of all documents to be used to support that parties claims and defenses; 3) a computation of that party's damages; and, 4) any insurance policy that may be in place to satisfy part or all of the judgment.

Rule 26(a)(2) requires that experts be disclosed and a report produced. These disclosures must be made, if not otherwise ordered by the Court, within 90 days of trial. If solely intended as rebuttal, it is to be provided within 30 days of the other party's expert witness disclosure.

Rule 26(a)(3) goes on to require that each party, 1) identify each witness that the party expects to present and those that the party may present at trial; 2) designate those witnesses whose testimony is to be presented by deposition; and, 3) identify each exhibit the party expects to offer and those which the party may offer.

I submit that these required disclosures provide everything *necessary* to defend or prosecute the case. Have you turned over every stone? No. Have you researched and filed every possible motion? No. Can you zealously assert the client's position under the rules of the adversary system[1] and if necessary try the case? YES! For example, instead of depositions, witnesses may be interviewed, either in person or by telephone.

Of course, such a plan of attack must be discussed with the client at the inception of the representation. It is further recommended that it not only be discussed with the client, but that this plan be put in writing and consented to by the client.

While it is possible that the client may be upset with the result, that is true of every case. I have had more clients upset with the process than I have with the results. Furthermore, you will have provided your client a service that they may not otherwise been able to afford. While we all prefer to win, in one of my earliest trials, I discovered that often what the client really wants, even needs, is the opportunity to be heard - win, lose, or draw.

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[1] Preamble, Model Rules of Professional Conduct.

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The Obligation to Preserve Electronic Evidence

By David Zachary Kaufman

Introduction:

Under the Fed. R. Civ. P. whenever it can be “reasonably anticipated” that an action will be filed, all parties have a duty to preserve potentially relevant evidence. And "evidence" includes all information, including not just hard copy documents, but all electronically stored information. If you fail in this obligation, the sanctions can be devastating.

What information are we talking about?

Under the Federal R. Civ. P. you have a right to obtain information from all sources, whether maintained in hard copy or stored electronically. The party responding to the discovery request must diligently take measures to identify all sources of responsive information. Fed. R. Civ. Pro. 34 defines "document" to include information in any tangible format. “Documents” includes more than mere copies of documents. The definition also includes data compilations from which information can be obtained only with the use of detection devices". 1970 Advisory Committee Notes to Fed. R. Civ. Pro. 34. This means that the key computer and data control personnel within the company should be told in no uncertain terms to be sure that no information is destroyed or altered under the client's routine document retention policies. In other words, once litigation starts, the routine destruction of documents must be put on hold.

When does this duty start?

The duty to preserve evidence arises upon the reasonable anticipation of litigation and expands accordingly on receipt of pre-litigation correspondence, service of process and/or subsequently served requests for information. After litigation is commenced, the duty to preserve information may prohibit not only routine document destruction, but also the continued use of files and databases stored in electronic media. If the continued use of one's computers, files, and/or databases will alter the information that may be relevant to the litigation, a party may seek a preservation order barring further use until the information can be retrieved or copied.

What must counsel do to preserve the documents?

The court in *Zubulake v. UBS Warburg LLC,* 2004 U.S. Dist. LEXIS 13574, (S.D. N.Y. 2004) (*Zubulake V)*, outlined the duties of counsel to preserve potentially relevant evidence. The court explained those duties as follows:

1. First, when litigation is reasonably anticipated or at the commencement of litigation, counsel must issue a "litigation hold" which should be periodically re-issued to keep it fresh in the minds of employees and to make new employees aware of it.
2. Second, counsel should identify the persons who are "likely to have relevant information" and communicate directly with these "key players" to ensure that they are aware of their duty to preserve relevant information. These "key players" are the persons identified in a party's initial disclosures and any supplementation thereof.
3. Third, the court found that counsel have a duty to instruct all employees of their client to produce electronic copies of their relevant active files and to identify, segregate and safely store relevant backup tapes. The court went so far as to suggest that, in an appropriate case, counsel take physical custody of relevant backup tapes to safeguard the information.

Courts are imposing increasingly harsh punishments on corporations that fail to comply with orders to produce e-mail documents. Where judges once were more likely to accept that incompetence or computer problems might be to blame, they are now apt to rule that noncompliance is an indication a company has something to hide.

What are the Sanctions for failure to Preserve evidence?

Courts have imposed various and severe sanctions for a party's failure to ensure that a preservation order is implemented and followed. *In re: Prudential Ins. Co. of Am. Sales Practices Litig*., 169 F.R.D. 598, (D.N.J. 1997)) ($1 million sanction for failure to develop and implement an evidence preservation program). *See also Illinois Tool Works, Inc. v. Metro Mark Prods., Ltd.* 43 F. Supp. 2d, 951 (N.D. Ill.).

In another case, the court went so far as to strike the defendant's answer, based on its failure to obey a court order requiring the preservation of certain records maintained in the ordinary course of business. See *Wm. T. Thompson Co. v. General Nutrition Corp*. 593 F. Supp. 1443 (C.D. Cal. 1984) . In that case, the defendant's counsel did not instruct the appropriate officers and employees of the defendant to preserve records and actually instructed personnel not to deviate from the company's standard document retention policies. The court found that such conduct resulted in a bad faith destruction of critical evidence.

In *Mosaid Techs., Inc. v. Samsung Elecs. Co., et al.*, Case 07-7-7779 U.S. Dist. Ct. (Hedges, U.S.M.J. Sept. 2004) the Court crafted a special jury instruction not proposed by either side which was designed to punish the spoliator, deter future misconduct, and restore the movant to a position in which it would have been had its adversary faithfully observed its discovery duties.

The sanctions imposed by a court frequently depend upon the Court's view of the degree of wrongdoing. These sanctions may include attorneys' fees and costs, the exclusion of withheld evidence, jury instructions concerning adverse inference and, in cases involving outrageous and/or intentional conduct, actual dismissal of the action. *See, e.g., United States v. Philip Morris USA, Inc*., 2004 U.S. Dist. LEXIS 13580 (D.D.C.,July 21, 2004) (Defendant, disregarding preservation order, implemented policy of deleting e-mails after a period of 60 days received monetary sanctions of $2.75 million); *Zubulake v. UBS Warburg, LLC*, 2004 U.S. Dist. LEXIS13574 (S.D.N.Y., July 20, 2004) (*Zubulake V*) (after determining that UBS Warburg (UBS) failed to preserve discoverable e-mail and engaged in willful spoliation based on evidence that employees had deleted relevant e-mail from their computers, even though they had been instructed not to do so by both in-house and outside counsel. sanctioned UBS by making it pay all costs associated with the discovery dispute, including counsel fees and further granted a jury instruction that allowed the jury to presume that the missing information would have been detrimental to UBS.) *orMastercard International, Inc. v. Moulton*, 2004 WL 1393992 (S.D.N.Y. June 22,2004) (the court imposed sanctions on defendants for failing to preserve e-mails that were automatically destroyed by a computer server in the ordinary course of business. The court found that the failure to cease the customary destruction of email practices in effect prior to the litigation was a breach of the duty to preserve evidence and sanctioned the defendants by granting an adverse influence jury instruction.) *OrResidential Funding Corp. v. George Financial Corp*. 2002 U.S. App. LEXIS20422, (2d Cir., Sept. 26, 2002)-(finding that the "culpable state of mind"requisite for the imposition of discovery sanctions exists where the responding party has breached a discovery obligation, not only in bad faith or with gross negligence, but also though ordinary inadvertent negligence), *Metropolitan Opera Association v. Local 100 Hotel Employee and Restaurant International Union*, 212F.R.D. 178; 2003 U.S. Dist. LEXIS 1077 (S.D. N.Y., Jan. 28, 2003),(finding the misconduct so outrageous that it granted plaintiff's motion for judgment as to liability and awarded counsel fees incurred as a result of the discovery misconduct).

Conclusion:

If, as counsel, you have a reasonable indication that litigation is coming, or if litigation has already started, you must take steps to protect and preserve all the evidence, even electronic evidence. And you must do so at once. If you fail in this duty, both you and your client, could suffer serious consequences.

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Tips on How to Make it Through Trial

There are three principles that you should keep in mind during a multi-defendant trial:

The first is the importance of communication between all codefendants. Even if they are a pain in the neck, follow the rule that you should keep your friends close but your enemies closer. The last thing you need is to be surprised by a codefendant's case. Share opening and closing statements, if possible, and determine who will go first in the presentation of the defense. Even if you are not a peripheral defendant but a main focus of the government's case, keep close contact with those defendants who you may consider "free riders." Errors made by codefendant's counsel can rebound to the detriment of every defendant.

The second is to assess your role in the case. Is your client a main defendant, or a peripheral one? For example, two defendant in a large RICO case sat for ten months before their names were even mentioned. Marcus, supra, n. 162. If you client falls into the latter category, adopt an approach that mirrors his level of involvement so as to minimize the attention paid to him by the jury. Keep your client in a minimal role by your own conduct during trial. Make his or her level of involvement clear in a brief opening statement; only make objections that count for evidence and testimony that directly implicate your client; consider not cross examining a witness if he or she has not offered any testimony that relates to your client or if codefendant's counsel has ably destroyed the witness' credibility or made points that you would have; adopt a professional, low key demeanor during trial; and bring home the point in closing that it may be clear why the other defendant's are here, but the jury might have to think long and hard to come up with a theory of why the defendant is named in the indictment. Cotsirilos and Kennelly, supra, at 43-44.

The third is to try and distance your client from the disruptive codefendant. This is essential because even as in the case of *United States v. Lara*, 181 F.3d 183

(1st Cir. 1999) , where the defendant, a/k/a "King Animal" stood up, turned his back to the jury, unzipped his pants, and urinated on the carpet in the courtroom, the defense motions to sever were denied, and the denial of those motions upheld by the trial court. Why? Because the courts are of the opinion that a cautionary instruction will cure whatever prejudice might spill over to the defendant. Alternatively, a reluctance to grant such motions also precludes defendants from acting up during a trial with outrageous conduct when they realize that it's not going well and they would rather take their chances in a second trial. Marcus, supra, at 97.

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Real Estate

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15 Things to Remember in Drafting Real Property Easements
An Easement Checklist

By K.F. Boackle

1. Get a clear understanding of the current intentions of the parties and the physical characteristics of the land, as well as the future intentions of the parties and the potential development of the land.

2. State the purpose of the easement (in addition to traditional purposes, an easement can be used to settle encroachment disputes).

3. Describe the easement area.

4. Describe the easement rights to be created (should be as broad or a limited in scope as intended by the parties).

5. Describe the land to be benefited ("dominant parcel"), and address potential subdivision of the dominant parcel and whether the benefits should be extended to additional property acquired by the owner of the dominant parcel.

6. Express the duration of the easement (perpetual, for a term of years, or until a specified event).

7. Express whether the easement is (1) intended to be personal to the grantee ("in gross"), in which case the restrictions on transferability should be expressed, or (2) intended to be transferred by the grantee to subsequent owners of the dominant parcel ("appurtenant"), in which case the terms "appurtenant" and "covenant intended to run with the land" should be used in the instrument.

8. Express whether the easement is exclusive or nonexclusive (address the use of the easement area by the owner of the servient parcel and others).

9. Address whether the easement holder has the right to construct improvements within the easement area.

10. Address the allocation of maintenance responsibilities and expenditures (include the right of access outside the easement area for repair, if needed).

11. Record the easement instrument.

12. Perform a title search of both the dominant and the servient parcels.

13. Determine whether there are mortgages or other liens superior to the easement; if so, obtain subordination agreements from the holders of such liens.

14. After creation and recordation, any conveyance of the dominant parcel should describe the easement in the granting clause and any conveyance of the servient parcel should except the easement from any warranty.

15. Lenders or creditors taking a mortgage or other lien on the dominant parcel should be sure that the easement is described in the granting clause of the lien instrument and that the title parcel covers the servient (as well as the dominant) parcel.

Did you find this checklist helpful? Do you think more information like this would help you? More information is available - This checklist was republished with permission from the GP|Solo Publication: *Real Estate Closing Deskbook, 2 nd Edition – A Lawyer's Reference Guide & State by State Summary*; pp38-39, by K.F. Boackle. GP|Solo members can purchase this book, which includes electronic forms, at a discount through the GP/Solo bookstore website: http://www.abanet.org/genpractice/books/index.html

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Need House Work?
Tips on Choosing the Right Contractor

By Ellen Rappaport Tanowitz

With housing prices rising to extraordinary levels, perhaps you have considered renovating rather than moving to a larger house. Here are some points to consider before you sign on the dotted line with a contractor.

• Ask for referrals from friends, family, colleagues, and neighbors. Receiving a referral from someone you know is often the best way to find the right person to do the job.

• Keep in mind the scope of the job. For example, if you want to add a twostory addition to your home, the contractor who redid your Aunt Jane's half-bath is not necessarily the person for the job. Like lawyers, contractors have specialties, and ripping off roofs and sides of houses is far different from replacing some plumbing fixtures.

• Be wary of references from the contractor, who will likely give you his three best customers. Rather, ask the contractor for the names of the last 3 projects he has completed or is presently working on. If he hesitates, it could be a warning signal. Additionally, ask to visit one or more of his current work sites.

• Determine the licensing regulations in your state. In Massachusetts, a contractor must register with the state as a home improvement contractor. An examination is not necessary; however, most residential construction projects, renovations, or new construction require a construction supervisor. A construction supervisor is licensed by the state and is required to take an examination. The process can get complicated; insist that your contractor follow the rules, which could be a prerequisite to collecting from a state fund set up to protect consumers from fraudulent contractors.

• Make sure your contractor has insurance—worker's compensation and errors and omissions—and that the coverage amounts are sufficient. If your contractor fails to secure the tarps on your exposed roof and water gets into your home, the damage could be significant. By the same token, contact your own insurance company and find out whether you can add a rider for a nominal cost. That way, if something goes wrong you will at least be reimbursed. The insurance companies can then fight out who ultimately pays the claim, not you.

• How busy is the contractor? This is tricky because a contractor who is not busy may not be a contractor you want on your job. On the other hand, a contractor who is too busy may not be able to devote the necessary time to your job. Find out who will be overseeing the job. Who will be at your home daily? Make sure you know whom to call if any questions or problems arise.

• When drafting or reviewing the contract, consider all the things that can go wrong—a rock ledge six feet down, torrential downpours, a plywood shortage—and be clear about whose responsibility it is to pay for damages or delays in such scenarios.

• Finally, the most important thing is to control the money! It is reasonable to pay the contractor a certain amount up front for supplies and down payments to subcontractors. However, never pay a contractor more than one-third of the contract price in advance and do not pay for work before it is completed. Many contractors will set up the contract so that they can request a check at least once a week. Be sure the contract defines the steps in your job—demolition, pouring the foundation, erecting interior walls, and so on. Tell the contractor that you will pay as each task is completed and include it in the contract.

Of course taking all these steps is no guarantee of a problem-free project, but they will help direct you to a good contractor.

Ellen Rappaport Tanowitz is a solo practitioner who survived a complete gut of and addition to her kitchen last fall.

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The Top Five Reasons to Clerk for the Department of Justice, United States Attorney's Office

By Cristen Dutcher

5. Teaming with Diligence and Experience

The United States Attorney's Office (USAO), an arm of the Department of Justice (DOJ), employs only the most skilled and experienced attorneys for federal prosecution. Not only do clerks work for and learn from USAO attorneys, but we also frequently work with DOJ agency attorneys, who hold vast knowledge bases in specific areas of law. Both agencies' attorneys are the cream of the crop, and should be as Representatives of the United States of America.

4. The Department's Distinguished Reputation

The excellence of USAO attorneys carries over into a widespread reputation of distinction for the entire office. Even low-level clerks receive high-level respect when dealing with outside parties, such as expert witnesses. Every type of correspondence outside the DOJ is met with warmth, cooperation, and willingness to help beyond expectation – any law clerk's dream!

3. Excellent Clerking Conditions

As a USAO clerk, you are expected to "learn first, labor later." That means the main focus of your job is to learn about the law, not just run around doing an attorney's grunt work. In addition, the DOJ runs on normal office hours, and unless a trial is pending, *everyone* is expected to clear the office at quitting time. Observance of all federal and state holidays is a nice bonus too.

2. Required High Level of Ethics

Though a clerk holds a relatively small role in a DOJ office, clerks are expected to participate in what the DOJ calls “the discovery of truth.” On the first day of employment, a clerk is told that the DOJ is not interested in billable hours, clients, or winning every case. The DOJ wants to discover the truth, even if that means losing a few cases. Such a high ethic level garners the proper perspective for the practice of law within impressionable clerks.

1. “The Best Place to Work in the United States”

At the DOJ/USAO, every law clerk will enjoy a great experience, complete with networking, ethics training, and practical legal education. Such a clerkship encourages students to participate in the DOJ as future attorneys, not a bad idea, as it is a great place to work. In fact, the Department of Justice is “THE best place to work in the United States with a law degree” according to Kimm Walton in *America’s Greatest Places to Work with a Law Degree*.

Cristen Dutcher is a third-year student at Mercer University School of Law.

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The Best Things About Clerking for a Solo Practitioner or Small Firm

By Konrad Ziegler

Hands-On Experience

From Day One, you will be given hands-on projects for real clients.

Being Able To See The Whole Case

Working with a small firm or solo practitioner allows a clerk to see and actively participate in the entire case, not just a small slice of it. This experience is beneficial for a clerk's future practice, where one will be confronted with all the possible legal and non-legal consequences of a decision; unlike the isolated "Petri dish" of a law school problem.

Meeting With Clients

In a small firm or a solo practitioner's office, a clerk is often encouraged to attend meetings with clients. Rather than being locked up in the broom closet, a clerk gets to personally observe an experienced attorney counsel clients.

Opportunities For Mentoring

A clerk's intimate involvement in a small firm or solo's cases inherently creates many opportunities for the attorney to mentor the clerk using real life problems.

The Respect Of The Supervising Attorney

Because there may only be one or two clerks at the office, the supervising attorney saw something special before you were hired. Usually you are not one clerk in a herd of summer associates, so the attorney can really get to know you and you will soon earn their genuine trust.

Getting To Know The Support Staff (And How To Make Their Lives Easier!)

In the real world, your best friend and loyal protector will be your staff. As a clerk at a small firm or solo practitioner's office, you will really get to know the secretaries and paralegals and often learn much of the nuts and bolts of legal practice. This will be invaluable to you in the future.

Special Opportunities

Since you'll probably be one of the only clerks around, all the cool stuff that comes along winds up in your hands. Unlike taking everyone in the "class" to a baseball game or throwing some boring cocktail reception, solos and small firms will provide unique opportunities that are simply impracticable for large groups. For instance, I was my firm's sole representative at the Danish Business Summit and the Danish Ambassador's residence in Washington, D.C.

Exposure To A Wide Variety Of Practice Areas

Many solo and small firm practitioners have a more generalized practice than more specialized firms. You will get to observe and participate in many different areas of law. For example, in the last 8 months, I have provided legal assistance in business law, environmental defense, personal injury, Article 9 litigation, private international law, contracts, and real estate litigation, just to name a few.

A Relaxed Atmosphere

Don't get me wrong. Small firms and solos demand just as much, and maybe even more, effort as larger firms. However, the rat race mentality brought on by the struggle for partnership and unreasonable billing hours rarely exists in a small firm or solo's office. The majority of small firms and solo's offices operate like a big family, a hard working one, but a family none the less.

Konrad Ziegler is a third-year student, Mercer University School of Law.

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Yes Virginia, Law Can be Learned On-Line

By William I. Weston, J.D., Ph.D.

Clinging to tradition is important in any endeavor; no less so in training lawyers who base their work on the concept of precedent. It is hard to bring change to a profession that takes change so very slowly. For legal educators, systemic change is even harder to accomplish because the process of law teaching has never been based on educational theory, adult learning theory or on innovation. Rather legal education is consistently look back to Harvard Professor Langdell and his teaching innovation at the end of the 19 th century. To be sure, there have been changes including on line research, the use of websites and new approaches by individuals. However, the educational model in other fields of endeavor continue to march past legal education. One such model is on line learning.

There are many myths about on line education and most are based on a lack of understanding. First and foremost, on line education requires a much more significant substantive and philosophical analysis of each course than in fixed facility programs. When a student begins an on line course, the entire course is completed, is based on stated learning objectives (usually unit by unit) and guarantees a consistency not based on individual faculty but based on a model grounded in learning outcomes and in outcome measurements. So the old rubric that one's success in a law course depends on which faculty member is chosen is not part of the fabric of on line learning. The second important aspect is one that is well established in educational circles with the exception of legal education. That principle is frequent assessments with detailed feedback. Instead of the one exam a term approach in which a bluebook is returned containing little more than a grade, on line learning has frequent and varied assessments built into nearly every unit. One unit the assessment might be a quiz, the next might contain a short essay. Each is returned promptly with a model answer and specific feedback. On line education also allows for extremely creative assessments such as hands on drafting and innovative assessments. All include detailed feedback provided with a quick turn-around. The assessment in on line education is considered an important part of the teaching and learning matrix as it should be in any educational environment. Assessments are only one part of the learning matrix. Student discussion boards, live on line classes and quick responses to student inquiries provide a complete matrix.

The third component is the faculty. Instead of choosing faculty whose experience is limited to the acquisition of an LLM and or clerking for an appellate judge, on line professors are usually people who practice in the field and also have teaching experience. The emphasis of the faculty in the on line environment is first the ability to be an effective teacher and then the ability to engage in research and scholarship. The reality of the law school environment in general is of course the exact opposite. Moreover, faculty are evaluated frequently and on a variety of metrics. Detailed student evaluations of faculty performance have considerable weight along with regular visits to faculty classrooms – often unannounced. In addition such metrics as the speed and quality of responses to student inquiries (email) and the quality of feedback on assessments are an important part of the evaluation of faculty. There is no tenure; so faculty earn their stripes every year no matter how long their service to the institution.

One of the major criticisms of on line education is that it lacks the direct student/ faculty contact that comes from what is called in the academy – “seat time”. Somehow (and unsupported by any data), there is a belief that if a student sits long enough in a law school seat, he or she will better learn the law. Some students, especially younger students who have no professional experience may need the discipline of “seat time”; but the reality is that increasing numbers of students today are taking some or all of their undergraduate education on line and succeeding in the process. Some students also need more direct contact in order to succeed. No one is suggesting that one size fits all and that the only way to go is on line. However, for an increasingly large group of students, the self-discipline coupled with the approaches indicated above, provide a learning environment that results in success. Moreover, on line education affords larger groups of people access to legal education and the opportunity to grow intellectually, to become better and more effective citizens and sometimes to change careers. The limitations of the current law school environment that require “seat time” and are limited to certain geographic areas and day programs, result in denying access to a significant group of potential law students.

Student/faculty contact can come in different forms and can appeal to different types of a students who may not need the frequent contact or the enforced discipline of the fixed facility school. Single parents, people in rural locations, individuals with high profile or intense employment situations are examples of those who can function well in the on-line environment. Not everyone needs the personal, face-to-face interaction with a law professor to achieve success. On line programs provide the same contact; it is just not face to face. There is some thinking that the absence of face to face contact removes the chance for prejudice, judgments and innuendo and replaces it with decision-making based on actual performance. In an increasingly web-based society, the use of email and video conferencing is already supplanting the use of face to face meetings and that is only going to increase.

On line education for lawyers is an alternative approach. It has imperfections and does not work for everyone. However, the myth that it is somehow less than a fixed facility education is just that – a myth. One significant difference is that on line education is constantly changing, reevaluating every aspect and thinking out of the box; unlike its fixed facility counterparts. In addition on line education is focused on the student rather than the faculty; on quality teaching rather than scholarship and on the delivery platform rather than pure academic freedom. In many respects the on line program has provided some interesting answers and new approaches to long standing concerns about the quality and delivery of legal education in fixed facility law schools.

The demand for greater acceptance will come from the consumers as is already occurring in LLM and Master’s level programs. One can only hope that the legal academy will listen and open their minds to a new approach.

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Conflict-Checking Systems: Three Great (and Cheap) Ways to Effectively Manage Conflict Checking

By Todd C. Scott, Esq.

The purpose of a conflicts check is to ensure that your commitment to your client's matter will not be distracted by your commitment to any other person. Many attorneys believe that this commitment can be upheld by a brief moment of thought, comparing their client's circumstances to that of the firm's other clients, at the time they are being retained for their services.

Professional liability insurers and risk management professionals continually stress the importance of a conflict-checking system in law firms to help identify potential conflicts at the time the attorney-client relationship is established. Consistently, it has been shown that a check for conflicts-of-interest that does not include the use of a thorough list or database will leave the firm vulnerable to an embarrassing, and potentially negligent conflict-of-interest problem.

Establishing a reliable conflict-checking system in your firm can be a relatively easy thing to do. However, the system is only as good as the information that is put into it. Therefore, creating the conflict-checking system and maintaining it should be viewed as an ongoing and permanent commitment to securing your client's confidence and your devotion to their best interests will never be questioned.

The elements necessary for conducting an effective conflicts check in your law practice are:

- Establishing a thorough, well-maintained list of names;
- Ensuring that the conflict-checking procedure becomes a part of firm's routine;

- Everyone in the firm is trained in the procedure and involved in the system.

The best conflict-checking system is one that will work, and that the members of the firm will find easy to use and maintain. There is nothing inherent in a computer-based conflicts program that makes it superior to a well-maintained manual system. However, since a computer-based conflicts system can conduct a thorough check rather quickly, it is more likely to be used routinely by the firm, and it is less likely to overlook a single name buried in a large database.

A Forms-Based Conflict System

In a forms-based conflict system, you search for conflicts by checking a list of the firm's clients (current and former), a list of "other parties," and a list of lawyers who have represented other parties involved in your client matters. These searches must be conducted prior to the new client signing a retention agreement with your firm.

The primary conflict review occurs when you check the client list. You are looking to see if any person who is an adverse party to a new matter is currently being represented by the firm in another matter, or has been represented by the firm in the past.

If a review of the client list reveals no potential conflicts, you should then review the other parties list and the lawyer list to see if there are any relationships involving the firm's current or past legal matters that the new client would probably want to know about.

The best way for the law firm to establish and maintain these lists is to keep them in three separate binders. The client list in the first binder is updated every time a new client retains the firm to handle a legal matter. A Client Data Sheet containing basic information about that client is added to the binder in alphabetical order, and is permanently stored in the binder.

The second and third binders containing lists of other parties and lawyers are always being updated as a client's matter is ongoing. As you learn of new parties and individuals, as well as attorneys that become involved in your client's matter, you fill out a short Conflicts File Memorandum form indicating the name of the person and their relationship to the legal matter involving one of your clients.

Be aware that of the three binders described above, it is the list of other parties related to your legal matters that will easily become the largest volume. Knowing exactly which names to add to that list can change depending upon the areas of practice that you are involved in. The list should include any person significantly involved in any of your legal matters, as well as any individual closely associated with the firm. The parameters described here are wide and may include witnesses, heirs, and parties, as well as investigators, adjusters, and the third-party vendor who fixes the firm's computers. (For further guidance about the names that should be included in this list, see the Conflict Parties list included in MLM's online library.)

Remember, a conflict of interest can be waved by your client if the individual agrees to the waver after you have fully disclosed the potential conflict to them. Therefore, if you are on the fence as to whether a conflict of interest does exist, advise your prospective client of the relationship you have discovered in your search, and let them decide whether the connection is too close for their comfort.

Using Software to Search for Conflicts

One common misunderstanding involving law office software is that there is a category of software products called "conflict checking software." Although there are a handful of software programs that purport to be used exclusively for conflicts checking, for the most part, there are no software titles available for lawyers to perform this exclusive task.

In the world of law office software, conflicts checking tools are commonly available in case management software programs. The connection between conflicts checking and case management software makes sense. After all, if you take the time to enter detailed information about your clients, former clients, witnesses, opposing counsel, interested parties and just about everyone else who has ever come in contact with the firm in a software program, what it starts to resemble is a large database of firm information that can be used for several purposes – including conflicts checking.

Since case management products became affordable for use in small law offices in the days of Windows 95, this category of software has rapidly secured its spot as the hub of a law firm's information system. Case management software performs two vital functions for a law practice: it is a comprehensive database of information concerning the firm's clients, and it also serves as a calendaring/docket-control system that can be accessed throughout the firm.

The manufacturers of case management software understand that lawyers want to have the ability to quickly and easily perform conflict checks across the program's entire database. Therefore, performing a conflict check in a case management program is usually as simple as pushing a single button after entering a name to search for within the system. The searches are so quick and so thorough, that after determining that the name "John Smith" was not found in the lists of current clients, former clients, and other parties, it will then search the calendars of the lawyers in the firm, and even the note pads within the electronic client files to see if someone has come in contact with the name in an informal way.

For those lawyers interested in the conflicts-checking features of case management software but don't have an interest in establishing a firm-wide database program, you may want to consider purchasing a single-user version of a case management application and use it exclusively for maintaining the conflicts database. With this type of set-up, the software program would be installed on one workstation within the firm, and the computer user would become the firm's designated conflicts checking clerk.

Case management software comes with many dynamic features for tracking client information all throughout the firm – but there is no requirement that the purchaser use the software for all that it can do. Just as many users logon to Microsoft's Outlook for nothing more than to send and receive e-mail, it would be okay if your firm purchased a case management software product simply for its conflict-checking abilities.

A Simplified Tool That You Already Own

Not all automated conflict checking systems for law firms need to be in a specialized software application. Did you know that you can create a simple, searchable database in any word processing program? By taking advantage of the search features in your word processor you can easily create a dynamic conflict checking tool.

To create this simple database in Microsoft Word, start by creating a table in your document by selecting "Insert/Table" from the "Table" menu. Indicate in the Insert Table screen that you want your table to have 8 columns and 100 rows, and then click OK. When the table is inserted in the word document, label the tops of each column as follows: No., Date, Contact, File, Matter Type, Relation Code., File Status, Misc. Information.

Once the table is created with column headings, it should be permanently saved in the firm's computer network. As new files are opened at the firm, enter names of persons related to the matter in the table just as you would enter them in the binders of your forms-based conflict system. Over time, the document will become quite lengthy as the names of many persons associated with your case files are added to the table. (To add more rows to the table, put your cursor in the bottom right cell and click the Tab key. Let the table get as long as you like.)

You need not worry about searching for potential conflicts in such a long list because your word processor has a quick search tool for finding a needle in a haystack. In Microsoft Word 97 or 2000, the search tool can be found if you click on the “Edit” menu and choose “Find.” After that, just enter the name you are searching for, and if the name appears somewhere in the table, it will be indicated during the search.

If the name of an individual that is about to retain your firm appears somewhere on the list, you may have a potential conflict of interest with another matter. It is up to the attorney who is assigned to the matter to determine if a conflict of interest exists, using the criteria in ABA Model Rule 1.7 and your local rules of professional conduct.

The conflict checking database you create in your word processor is really no different than the manual, form-based system – it just holds more information, has an easy search feature, and does not need to be printed and kept in binders. Like all databases, it should be back-up regularly on tape or disk and copies of the backup should be kept off-site. The system meets the needs of most small law firms, but larger firms should consider employing the larger database capabilities found in case management software.

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Planning For Disaster –Ethically

By: William I. Weston, J.D, Ph.D.

Weather related events over the past two years have raised awareness, for everyone, of the need for preparation and anticipation in continuing the law practice. Nowhere is that issue more relevant than for the solo and small firm practitioner. Nor is the need for preparation and anticipation limited to weather related events. One can add issues like terrorism and fire to weather related events that can be a devastating impact to a law practice.

Often the reaction to this issue is one of denial coupled with a statement that there is no time to take the steps to prepare. For a lawyer, however, the issues transcend the mere protection of computers and property like the florist or the deli-owner. There is a strong ethical component to this issue which, if ignored, can challenge the lawyer's license to practice. The obligations to the client and to the court are not solved by a blue plastic tarp on the roof of the lawyer's office building.

The investment of a relatively small amount of time during a period of calm can make the difference between continuity of practice and a disaster that destroys the lawyer's practice and perhaps the lawyer's ability to practice in the future. Even in catastrophic situations in which the entire community is in distress, client needs and responsiveness to the court will likely be slowed or stopped for a relative short period of time but will return quickly. In the case of the recent severe hurricane in south Florida – Wilma – where the Broward County Courthouse suffered the loss of more than 170 windows in addition to other damage, Court business was reestablished in satelite in a relatively short period of time. If the catastrophic event is unique to the lawyer – such as fire or flood – the tolerance of delay by clients and by the Court will be limited.

This issue is particularly challenging for the solo practitioner because the solo, as is well known, is an individual faced with multiple demands. These demands run the gamut from rainmaking to lawyering to human resources to financial coordinator for the practice. To add an additional requirement of disaster planning with the inherent ethical issues can seem overwhelming.

Yet, the investment that the lawyer has made in the practice of law requires a further investment in preparation and anticipation of a disaster. In addition, the process of preparation and anticipation require attention to the issues of client confidentiality, diligence as well as the economics involved in the costs of legal services. Even conflicts of interest must be considered in the process of disaster planning.

There are three stages to the process of disaster planning. The first is evaluation. During this phase, the lawyer along with staff members would careful evaluate the current state of the practice itself. By the way, this is not a bad idea in general for law practices. Evaluation would be made of the physical plant of the office, computer systems, records, filing systems, backup systems for computerized data, staffing including a review of staffing locations and family, and, finally client base. The information provided gives the lawyer a formal and organized data-set of the practice – a veritable snapshot from which the next stage of the process can take place – the disaster plan.

The disaster plan has several parts – the physical plant, technology, staffing and client needs. The physical plant requires an evaluation of how the office will be reestablished as quickly as possible after the disaster takes place. The physical plant plan includes physical location, accessibility, process of moving, ergonomics of the new office, maintaining and protecting client confidentiality. This phase also includes the process of storing and then moving client records while at the same time protecting them to insure the continuity of client matters. The ergonomics part of the plan takes into consideration the establishing of a function temporary office that operates effectively and efficiently The technology plan deals with reestablishing computer records and systems including time and billing as soon as practicable. This part of the plan is predicated on a careful and preexisting system of data backup and protection and the ability to make use of alternative computer equipment in the event the major equipment is destroyed in the disaster. Finally, the staff aspect of the plan considers the needs of the staff before, during and after the disaster. Staff members, like the lawyer, have families and homes that need to be protected in the case of a community disaster. The relocation of the office has to take into consideration such issues as the ability of staff to get to the office, the schedule of staffing while considering the needs of staff members to care for their families and of course the economic issues of staff salaries and client fees. Care should be made by the lawyer to consider the implications of all of this to the fees charged and collected.

The last phase is the recovery plan and that too must be considered in advance. When the disaster has abated , the lawyer can return either to the prior office or establish a new permanent office. Many of the same issues raised above must be considered carefully in this phase. Clients will expect a functioning office prepared to diligently represent the client's needs. The Court will expect the lawyer to fulfill prior obligations. The staff will expect a reasonable return to whatever is normal for that firm. The operative concepts in the recovery phase are speed, efficiency, client-centered thinking and organization.

For all three phases it is extremely important that staff members know their roles and duties before, during and after a disaster. Things like a phone tree and written instructions are essential. Staff should know how to prepare the office in anticipation of the disaster (often there is warning of a flood or weather issue). Even if there is not a great deal of time, staff need to understand what they must do to save the assets of the firm and especially client data.

If all of this appears overwhelming, it is important to secure the help of people who understand the processes involved and how to develop effective disaster planning. The more that the lawyer protects data, provides for back up, provides redundancy in computers and anticipates the needs as briefly described above, the more the firm, the staff and ultimately the client and the court will be able to achieve continuity with ethical protection of the legal matters in the practice. These events will occur as everyone witnessed during the past two years. Unlike the deli owner or the florist, the lawyer must respond not only to the disaster but to ethical obligations which do not abate in a disaster. The operative words here are preparation and anticipation.

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